SHOW PROCEEDINGS AND ORDERS DATE: [06/27/89]

CASE NBR: [88101461] CFX STATUS: [ ]
SHORT TITLE: [Christy, Richard, et al.]
VERSUS [Lujan, Sec. of Interior] DATE DOCKETED: [030189]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
Jan 11 1989		Application (A88-560) to extend the time to file a petition for a writ of certiorari from February 1, 1989 to March 3, 1989, submitted to Justice O'Connor.
Jan 12 1989		Application (A88-560) granted by Justice O'Connor extending the time to file until March 3, 1989.
Mar 1 1989		Petition for writ of certiorari filed.
Mar 1 1989		Appendix of petitioner filed.
Mar 31 1989		Brief amicus curiae of Mountain States Legal Foundation filed.
Mar 31 1989		Brief amici curiae of Montana Stockgrowers, et al. filed.
Apr 5 1989		Order extending time to file brief of respondent on the merits until May 15, 1989.
Apr 26 1989		Brief of respondent United States in opposition filed.
May 2 1989		DISTRIBUTED. May 18, 1989
May 3 1989		Reply brief of petitioners Richard P. Christy, et al. filed.

Last page of docket

SHOW PROCEEDINGS AND ORDERS DATE: [06/27/89]

CASE NBR: [88101461] CFX STATUS: [ ]
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PAGE: [02]

DATE	NOTE	PROCEEDINGS & ORDERS
May 3 1989		Brief amicus curiae of American Farm Bureau Federation filed.
May 19 1989		REDISTRIBUTED. May 25, 1989
May 26 1989		REDISTRIBUTED. June 1, 1989
Jun 2 1989		REDISTRIBUTED. June 8, 1989
Jun 12 1989		Petition DENIED. Dissenting opinion by Justice White. (Detached opinion.)

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(1)

No. 88-1461

In The

Supreme Court of the United States

October Term, 1988

RICHARD P. CHRISTY, THOMAS B. GUTHRIE and IRA PERKINS,

Petitioners,

vs.

DONALD P. HODEL, Secretary of the Interior and THE UNITED STATES DEPARTMENT OF INTERIOR

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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February, 1989

23 pp.

QUESTIONS PRESENTED FOR REVIEW

I. Is the protection of one's property from imminent destruction by federally protected wildlife encompassed among the rights guaranteed by the Constitution of the United States of America?

II. If such right is encompassed among those guaranteed by the Constitution, what is the appropriate level of review to be used in determining whether governmental proscription on its exercise meets Constitutional requirements?

III. If such right is encompassed among those guaranteed by the Constitution, can the complete proscription of its exercise as contained in the Endangered Species Act and regulations promulgated thereunder satisfy the appropriate level of review?

IV. Does the absolute prohibition of the right to protect one's property from imminent destruction contained the Endangered Species Act and regulations, and the subsequent failure to compensate for the losses sustained therefrom constitute a taking in violation of the Fifth Amendment to the Constitution of the United States?

V. Does the federal government's selection of a species of wildlife for protection and its proscription on the killing of such wildlife even in the immediate protection of one's property render such species an agent of the government for purposes of determining whether destruction of private property by such wildlife constitutes governmental taking for Fifth Amendment purposes?

VI. Does governmental relocation of protected wildlife render such wildlife an agent of the government for purposes of determining whether any subsequent destruction of private property by such wildlife constitutes governmental taking for Fifth Amendment purposes?

VII. Did the Ninth Circuit err in upholding summary judgment based on the absence of any genuine issues of material fact when Petitioners had been precluded by order of the District Court from conducting any discovery to obtain such material facts?

LIST OF PARTIES

The parties named in the caption of this Petition are the same as those named in the proceedings below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. _____

In The

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DONALD P. HODEL, Secretary of the Interior and
THE UNITED STATES DEPARTMENT OF INTERIOR,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 21, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 857 F.2d 1324 and is reprinted in the Appendix at p.6a. The memorandum and order of the United States District Court for the District of Montana (Hatfield, D.J.) was not reported. It is reprinted in the Appendix at p.2a.

JURISDICTION

Petitioners brought this action in the District of Montana, invoking federal court jurisdiction under 16 U.S.C. §1540; 28 U.S.C. §1346(a)(2); 28 U.S.C. §1331; and 5 U.S.C. §702. On May 4, 1987, the United States District Court, Montana District granted Respondents' Motion for Summary Judgment and entered judgment thereon. [p.1a]

Petitioners appealed to the Ninth Circuit and on September 21, 1988, the Ninth Circuit affirmed the Order of the District of Montana and entered Judgment. Petitioners timely filed a Petition for Rehearing, which Petition was denied by the Ninth Circuit on November 3, 1988. [p.33a]

On January 9, 1989, Petitoners filed an Application for Extension of Time in which to file this Petition up to and including March 3, 1989, on the ground that one of the counsel for Petitioners had been injured. By Order of this Court dated January 12, 1989, this extension was granted.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The due process and just compensation clauses of the Fifth Amendment to the United States Constitution, the provisions of which are printed at p. 56a.[1]

The following sections of the Endangered Species Act, the pertinent provisions of which are printed at p.57a - p.59a:

16 U.S.C. §1531(a) and (b)
16 U.S.C. §1532(6), (19) and (20)
16 U.S.C. §1533(d)
16 U.S.C. §1538(a)(1)(B)

50 C.F.R. §17.40(b), the pertinent provisions of which are printed at p.60a.

---

1. The Fourteenth Amendment to the United States Constitution applies by its own terms only to state and local governments. There is no equal protection clause that governs the actions of the federal government, such as those under consideration in this case. The cases have held however that if the federal government classifies individuals in a way which would violate the equal protection clause of the Fourteenth Amendment, it will be held to contravene the due process clause of the Fifth Amendment. These standards for validity under the due process and equal protection clauses are identical. *Bolling v. Sharpe*, 347 U.S. 497 (1954).

STATEMENT OF CASE

Petitioners, all woolgrowers, filed the action below after each had sustained significant sheep losses from depredating grizzly bears, an animal listed as "threatened" under the Endangered Species Act, 16 U.S.C. §1531 et seq. ("Act"). Petitioners share the common experience of having vainly sought assistance from the Department of the Interior ("Department") to avoid these losses and having been told they could not kill the grizzly bears even in the immediate protection of their flocks.

The stark reality of this statutory proscription against the defense of one's property was graphically demonstrated for Petitioner Christy on the evening of July 9, 1982, when he made an emergency visit to his flock after being informed that for six days two grizzlies and two black bears had been killing his sheep. [Transcript of Administrative Hearing of August 13, 1984, contained in the "Administrative Record for the Assessment of Civil Penalty Against Richard P. Christy", [CR 10] ("Tr."), p.55, l.10-21]. Christy had first learned of the depredating bears about a week earlier and as a result sought the assistance of the United States Fish & Wildlife Service's Animal Damage Control Unit ("Unit"). Efforts by the Unit to trap the offending bears had been a total failure. As of July 9, 1982, Christy had lost some 27 sheep to the bears.

While Christy was present with his flock on July 9, 1982, Christy witnessed an impending attack on his flock by two grizzlies. In response, Christy shot and killed one of them. Ultimately he removed his flock from that area having lost 84 sheep.

Pursuant to the Act, the Department assessed a $3,000 civil penalty against Christy for killing the grizzly. An administrative hearing resulted in a reduction of his fine to $2,500.

Petitioners Perkins and Guthrie had pastured sheep for many years. Both lost sheep to grizzly bears in 1984 and 1985. In 1985 alone, grizzlies killed approximately 30 of Guthrie's sheep, worth some $2,200. [Cm., para.8.0] Both had contacted federal authorities only to be told the authorities would try to prevent future losses, but in no event could Guthrie or Perkins kill the grizzlies even in the immediate defense of their sheep.

Both continued losing sheep and Guthrie finally ceased raising sheep. [Cm., para.8.2] These experiences mirror those of many other Montana stockgrowers.

Pursuant to the Act, the Secretary of the Interior ("Secretary") is authorized to promulgate lists of species which are endangered and threatened. [16 U.S.C. §1533(a)(1); §1532(6) and (20) p.58a] The Act specifically defines prohibited actions as to endangered species and authorizes the Secretary to regulate prohibited actions as to threatened species. The Act prohibits the "taking" of endangered species which is defined in pertinent part to include the killing of a protected species. 16 U.S.C. §1532(19)

The Secretary has listed grizzly bears *(ursus arctos horribilis)* as a threatened species. The pertinent regulations found at 50 C.F.R. §17.40(b) at seq. proscribe the "taking" of grizzly bears, except under the following, iimited circumstances:

(1) By anyone in self-defense or defense of others.

(2) By authorized state or federal employees only if the grizzly bear has committed significant depredations to livestock and it has not been reasonably possible to eliminate the threat through live capture.

In addition the regulations provide that up to 25 grizzly bears can be hunted and killed for sport each year in a designated geographic area of Montana, unless 25 grizzly bears were already killed that year in that same geographical area for whatever reason.[2] The regulations explicitly recognize the distinct possibility of grizzly bears' committing "significant depredations" to livestock. Neither they nor the Act makes any provision for compensating livestock owners for their losses.

Petitioners' Complaint in the United States District Court sought declaratory and injunctive relief alleging the existence of a Constitutional right to protect their property and a deprivation of that right by the Act and regulations in deroga-

2. At all times pertinent, Petitioners' flocks were all pastured within this geographic area.

tion of due process and equal protection guarantees. Petitioners also alleged that the Act and regulations effected a taking of their property without just compensation and due process of law.

Per Order of the United States District Court entered at a scheduling conference, no discovery was conducted by either party.[3] Respondents then filed a Motion for Summary Judgment, arguing that there is no fundamental right under the Constitution to protect one's property and that the Act and regulations therefore need only be rationally related to the preservation of grizzly bears. Respondents alleged that the Act satisfied this test and that the Act did not constitute a taking for which compensation was due. The District Court granted the Motion for Summary Judgment, adopting the Respondents' arguments.

Petitioners appealed to the Ninth Circuit, once again asserting the existence of Constitutional rights and protections, and that genuine issues of material fact existed as to whether the Act and regulations could satisfy Constitutional due process or equal protection guarantees.

In support of their due process argument, Petitioners described the following situations which occur with frequency due to the provisions of the Act and regulations:

> Livestock owners suffering from escalating losses from depredating grizzly bears must stand by while grizzly bears destroy their stock and after the losses are tallied, they are not even compensated. This occurs even after the stockgrower has fully cooperated with governmental authorities who have unsuccessfully attempted to trap the species.

3. The Court's ruling was based upon the Respondents' assertion at the time of the scheduling conference that their forthcoming motion for summary judgment could be decided solely by application of the law to the facts contained in the administrative record. As it turned out however, and as reflected in the Opinion of the Ninth Circuit, Petitioners were faulted for not raising facts outside the administrative record to defeat Respondents' Motion, even though the District Court's ruling and its effects in precluding Petitioners from submitting any evidence outside the record had been explained to the Ninth Circuit.

Since public reaction to this arbitrary denial of rights and resulting injustice would ultimately defeat the goals of the Act (protection of the grizzly), Petitioners argued the Act and regulations failed even the rational basis test.

Petitioners' equal protection arguments were based on their assertion the Act and regulations created two classifications and that genuine issues of material fact existed as to whether either of these classifications bore even a rational relationship to the purposes of the Act. The two classifications are as follows:

(1) Hunters can kill grizzly bears for sport each year; this same authority is withheld from livestock owners even in immediate defense of their stock.

(2) Stockgrowers near grizzly habitat are required to sacrifice their livestock in unlimited numbers to depredating grizzlies; the remaining citizens share in benefits of the Act but do not incur even the slightest financial loss.

The basis of Petitioners' Fifth Amendment taking claim was that governmental actions taken pursuant to the Act and regulations combined to result in a total physical destruction of Petitioners' livestock without any form of compensation. Relying on *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960), Petitioners argued that in violation of the Fifth Amendment, they are being called upon to shoulder burdens which should be borne by the public as a whole.

The Ninth Circuit declined to recognize the right to defend one's property from protected wildlife as a fundamental constitutional right and found that the Act and regulations rationally furthered a legitimate governmental objective. [p.18a] Petitioners' equal protection arguments were also rejected. The Ninth Circuit found the regulations created the following classification which was rationally related to the objectives of the Act: those who can hunt and kill grizzly bears for sport and livestock owners who cannot kill grizzly bears under any circumstances, even in immediate defense of their stock. [p.22a] Finally, the Ninth Circuit agreed grizzlies had

physically taken Petitioners' property, but found that the conduct of the grizzly bears was not attributable to the government. On that basis, it concluded there was no taking by the government which would trigger application of the Fifth Amendment just compensation clause. The Ninth Circuit dispensed with Petitioners' public benefit argument by its conclusion the Act and regulations do not "force" Petitioners to shoulder any burden. The Court said: "The losses by Plaintiffs are the incidental, and by no means inevitable, result of reasonable regulation in public interest." [p.29a]

On numerous occasions in its opinion, the Ninth Circuit referred to the fact Petitioners had not proffered any evidence concerning certain issues. For example, the Court said:

> Plaintiffs submitted no evidence, by affidavit or otherwise, in opposition to the Defendants' motion. [p.14a]
>
> When a Defendant's motion shows that there are no genuine issues of material fact, a Plaintiff's unsupported assertion to the contrary is insufficient to forestall summary judgment. [p.14a]

These observations appeared to influence the Ninth Circuit's ultimate decision that there was an absence of genuine issues of material fact. In fact, however, as explained at page 6, supra, Petitioners had been precluded from undertaking discovery and presenting any evidence in opposition to Respondents' summary judgment motion. Petitioners unsuccessfully raised this issue in their Petition for Rehearing.

On November 7, 1988, Petitioners moved the Ninth Circuit Court to reconsider its Order denying their Petition for Rehearing. The basis of this Motion was a footnote 9 of the Opinion wherein the Court noted its inability to decide an issue due to an absence of evidence in the record:

> We note that plaintiffs do not contend, and the record does not show, that the federal government physically introduced any bears to the areas near plaintiffs' properties. Whether the government may be held

> responsible for damage caused by bears or other wild animals that have been relocated by the government, under a theory that such animals are instrumentalities of the government, is a question we do not decide. [p.28a]

Christy's Affidavit in support of the Motion reflects his understanding that the bear he had shot may well have been transplanted to that area by government trappers. This possibility was affirmed by governmental officials. [See Affidavits of Richard P. Christy and of Sue Ann Love, p.35a and p.38a] The Ninth Circuit denied Petitioners' Motion to Reconsider without comment.

Petitioners seek a Writ of Certiorari based of their belief that the issues presented are of significant national importance since they affect not only Petitioners and their counterparts, but also the future of efforts to preserve threatened and endangered wildlife. Petitioners believe that the Ninth Circuit erred in its holdings on the Constitutional issues and in upholding summary judgment on the basis of Petitioners' failure to present evidence when that "failure" was solely due to the District Court's determination to stay discovery pending disposition of the Department's Motion for Summary Judgment.

REASONS FOR GRANTING THE WRIT

This case presents numerous issues previously undecided by this Court and in need of resolution. The federal government has acted by various legislation and treaties to protect wildlife. The method at issue in this case and its resulting effect is the Act's absolute prohibition on the killing of protected wildlife in the immediate defense of one's property and the failure of the Act to compensate for the property so taken. This has sparked a major conflict between the interests of government in preserving these species and farmers, ranchers and livestock owners. In states where grizzly bears are present or where this or other fearsome predators are likely to be reintroduced, flocks and herds are being and will continue to be depredated with alarming frequency and great economic

hardship to their owners. The three separate livestock owners in this case represent but a small percentage of those who have already been affected.[4]

A. The Existence Of A Constitutional Right To Protect Property Has Never Been Decided By This Court.

The resolution of this case requires as an initial step a determination of the existence and scope of a right under the Constitution of the United States to protect and defend one's property. When Petitioner Christy took aim and shot the grizzly attacking his flock he earnestly believed that he was exercising a right guaranteed him under the Constitution to protect his property from immediate destruction—a belief likely shared by most citizens. Yet, so far as is known, the question has never been decided by this or any other federal court.[5]

The absence of any express mention of the protection of property in the Constitution should not foreclose its existence among other rights protected. [See *Griswold v.Connecticut*, 381 U.S. 479 (1965) where this Court inferred a right to privacy despite the absence of express language in the Constitution.]

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4. This controversy has increasingly been discussed in a wide range of periodicals. Excerpts from some of these periodicals appear at p.62a - p.75a.

5. This same conclusion was reached by the Tenth Circuit in *Mountain States Legal Foundation v. Hodel*, 765 F.2d 1468 (10th Cir. 1985), on reh 799 F.2d 1423 (1986), cert. den. ___ U.S. ___, 94 L.Ed.2d 800 (1987), n.8 as follows:

> The Endangered Species Act authorizes as an affirmative defense...that the defendant acted to protect himself or another person from bodily harm. 16 U.S.C. §1540(a) (3), (b) (3) (1982). No similar statutory defense exculpates actions to protect property. Several state courts have held that, as a matter of state constitutional law, a person may kill wildlife contrary to the state's conservation laws where such action is necessary to protect his property. See, e.g., *Cross v. State*. 370 P.2d 371 (Wyo. 1962). No case has yet addressed whether a similar right exists under the United States Constitution,....

Its existence among the other basic, natural human rights guaranteed by our Constitution is as old as the Magna Charta itself and is reflected in the famous discussion of fundamental rights under the privileges and immunities clause by Justice Bushrod Washington in *Corfield v. Coryell*, 6 F Cas 546, 551-52, 4 Wash CC 371, F Cas No 3230 (Pa. 1823):

> What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, nevertheless, to such restraints as the government may justly prescribe for the general good of the whole ... to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the state; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental; to which may be added, the elective franchise, as regulated and established by the laws or constitution of the state in which it is to be exercised. (Emphasis added)

It is not surprising that the right to acquire, possess and protect one's property was listed in this discussion of some of the most basic, fundamental rights of all free people.

Several state supreme courts have expressly recognized such a right under their state Constitutions. *Cross v. State*, 370 P.2d 371 (Wyo. 1962); *Cook v. State*, 74 P.2d 199 (Wash. 1937); *State v. Rathbone*, 100 P.2d 90 (Mont. 1940). Most noteworthy of these cases is *Cross v. State* involving an interpretation of provisions of the Wyoming Constitution which are exactly like the federal Constitution in all pertinent particulars. The absence of any express mention of the right to

protect property Wyoming's Constitution was not determinative of the issue, as the Court said:

> Our Constitution does not have the exact wording of the Constitution of Pennsylvania [which expressly provides for property] and so counsel claim that the right to protect property is not a constitutional right. . . . It is unbelievable that the inherent and inalienable right to protect property, as well as life and liberty, recognized long before the Declaration of Independence, was ignored or omitted from our Constitution or is nullified thereby. • • •
>
> Id. at 376. (Emphasis supplied)

At present, both sides of this controversy operate with the assumption that their position is consistent with proper Constitutional construction. Petitioners and other stockgrowers emphatically believe that among the rights guaranteed by the Constitution is the right to protect their property from imminent destruction. The total absence of any provision for the right to protect one's property under any circumstances in the Act or regulations may reflect a Congressional view that no such right exists under our Constitution. *Mountain States Legal Foundation v. Hodel*, 765 F.2d 1468, supra. A decision by this Court would resolve this question to the benefit of property owners and protected species alike.

B. This Court Should Decide If The Right To Protect One's Property Is A Fundamental Right.

Assuming the protection of one's property is a Constitutional right, this Court would then determine whether or not it is to be considered a fundamental right. The opinion of the Ninth Circuit at p.6a reflects its belief this Court has admonished lower federal courts to refrain from expanding the rights denominated as fundamental:

> The Supreme Court's teaching is clear and unmistakable—federal courts should refrain from divining new fundamental rights from the due process clauses of the fifth and fourteenth amendments,

> at least when the claimed right is neither "implicit in the concept of ordered liberty," or "deeply rooted in this Nation's history and tradition." (citations omitted)

Petitioners will assert this right to protect property is "implicit in the concept of ordered liberty" and "deeply rooted in this Nation's history and tradition" and is therefore a fundamental right. Regardless of whether this position is ultimately adopted, it is of overriding importance that the question be resolved. Once this Court decides on the appropriate level of judicial review, it can then be used by the lower courts to determine whether a governmental abolition of that right violates Constitutional guarantees.

C. The Act And Regulations As Applied To Petitioners Thwart The Purposes of Preserving Endangered Predators.

The question of the existence of the right to protect one's property has arisen in the context of governmental protection of wildlife, where the interests of the government in preserving these species have conflicted with the individual's interest in either preserving and protecting his property and livelihood or being compensated for its loss. While the Act and regulations reflect commendable goals, they have created a most arbitrary and unjust situation totally contrary to the American concept of justice:

> Stockgrowers are being placed in the unbelievable situation where they must literally stand by and helplessly watch—and only watch—while their valuable property is being destroyed by depredating animals. The resulting losses are uncompensated.

This places an unconscionable burden on the livestock owner and it has and will trigger results contrary to the very purposes for which the Act was designed. As public outrage over this injustice spreads, support and available habitat for grizzly

bears or other protected predators will diminish.[6] The predictable result of this governmental scheme may well defeat efforts to expand governmental protection for indigenous predators and to reintroduce other predators absent from the continental United States.[7] The wolf represents a case in point. The Wyoming Congressional delegation brought so much political pressure in opposition to a plan to reintroduce the wolf into areas of Yellowstone National Park, that the plan had to be scrapped by the Director of the Defendant Fish & Wildlife Service. The reason: Wyoming stockgrowers reasonably feared depredations to their livestock would occur against which they would be defenseless, and for which they would receive no compensation.[8] Any statutory and administrative scheme which so frustrates the very goal it was designed to accomplish, and concomitantly deprives citizens of their Constitutional rights, fails to meet even the rational basis test.

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6. Respondents themselves have acknowledged that public outrage has a detrimental effect on efforts to preserve certain species. The acknowledgement came by way of its justification for allowing the killing of gray wolves in Minnesota under certain conditions. See *Sierra Club v. Clark*, 735 F.2d 608, 618 (8th Cir., 1985) In its promulgation of the regulations it stated:

> ... it would allow the killing of any wolf caught within the one-half mile distance since farmer outrage over the release of a trapped wolf "cannot serve the cause of wolf conservation". * * *

7. The subject of reintroduction of certain predators, most notably the wolf, into the Continental United States, is discussed with frequency in current literature. Examples of portions of the texts of these articles appear at p.76a-p.88a. The literature also suggests that the unfairness and frustration caused by the present system encourages illegal killings of grizzly bears. p.88a

8. See excerpts from articles at p.76a-p.88a.

D. The Act And Regulations As Applied To Petitioners Violate Equal Protection Guarantees By Allowing Hunters to Kill Grizzly Bears For Sport While Depriving Petitioners Of This Authority Even In Defense Of Their Flocks.

The regulations promulgated pursuant to the Act create the following classification: they authorize a certain group of people to kill up to 25 grizzly bears for sport while withholding this same privilege from stockgrowers even when necessary for the immediate protection of their stock and livelihoods. [50 C.F.R. §17.40(b)(1)(c)] (The regulations specify the geographic area in which the 25 grizzly bears can be hunted and killed for sport. This is the same area in which Petitioners have sustained substantial losses of their stock to grizzly bears.) The Ninth Circuit opinion cited the Secretary's findings that a carefully controlled hunt would relieve grizzly bear population pressures and condition bears to avoid all areas where humans are encountered. [p.24a] If indeed the killing of 25 grizzly bears is necessary to avoid over-population problems and to eliminate unwary bears and bear-human and bear-livestock contacts, then the 25 bears should first consist of those committing significant depredations on livestock. In this manner, Petitioners could then exercise their right to protect property, while bears who would be most fearful of human contact would survive. Any statutory scheme which on the one hand allows hunters to kill grizzly bears for sport while withholding this same authority to stockgrowers who are about to lose their property and livelihood (and then fines them if they do kill a depredating grizzly bear) cannot bear any relationship to the governmental purpose of preserving the species.

E. The Controversy And Far Reaching Effects Created By The Present Statutory Scheme Require This Court's Resolution Of The Taking Issue In The Context Of Protected Wildlife.

Though several state and lower federal courts have decided the issue of whether or not damage to private property from

protected wildlife constitutes a taking, the question has never been ruled upon by this Court. The federal government operating from its obvious assumption that destruction of property by protected wildlife does not constitute a taking has imposed very extreme hardships upon stockgrowers in its efforts to preserve threatened and endangered predators.

The government's action has caused great controversy and outrage among stockgrowers and other members of the public who steadfastly believe that the ongoing destruction of their sheep by governmentally-protected grizzly bears is a taking in the classic sense. Until a decision is reached by this Court as to the Constitutionality of the current regulatory scheme, the controversy will only escalate and its detrimental effects be prolonged.

In the case of *Armstrong v. U.S.*, 364 U.S. 40, 49 (1960), this Court described the purpose of the Fifth Amendment just compensation provision:

> It is axiomatic that the Fifth Amendment's just compensation provision is "designed to bar governments from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as whole."

The statutory and regulatory scheme at issue here imposes on Petitioners the very situation which the "just compensation" provision was intended to prevent. Preserving endangered species will ostensibly benefit the entire nation. However, it is the stockgrowers operating in or near grizzly habitat who alone are forced to bear the heavy burden of conserving this species. Frequently this occurs, as it did in this case with respect to Petitioner Christy, when grizzlies are introduced by the government into an area not previously inhabited by them.

As a part of its decision on the taking issue, the Ninth Circuit ruled while the grizzly bears were and are physically taking sheep, their actions were not attributable to the government. This conclusion is erroneous. The intolerable situation imposed on Petitioners is exclusively the result of extensive governmental control which requires stockgrowers to literally stand by and watch their stock being destroyed and

thereafter provides no compensation. It is a fiction to say that the grizzlies are not, as a result of that action, rendered instrumentalities of the government. Petitioners will argue it is the combination of the absolute prohibition on protecting property and the refusal to compensate for losses which effects a taking.

CONCLUSION

For these various reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted this 22nd day of February, 1989

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88-1461

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1988

RICHARD P. CHRISTY, THOMAS B. GUTHRIE and IRA PERKINS,

Petitioners,

vs.

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UNITED STATES DISTRICT COURT
GREAT FALLS DIVISION DISTRICT OF MONTANA

Richard P. Christy,
Thomas B. Guthrie &
Ira Perkins

JUDGMENT IN A CIVIL CASE

v.

Dondal [SIC] P. Hodel, Secretary
of the Interior and The United
States Department of Interior

CASE NUMBER: CV-86-024-GF

_____ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

_XX_ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and decision has been rendered.

IT IS ORDERED AND ADJUDGED Court concludes no issues of material fact exit [SIC] in the presnet [SIC] case and, furthermore, defendants are entitled to judgment as a matter of law. Therefore, defendants' motion for summary judgment is hereby GRANTED. Court hereby affirms the $2,500.00 fine assessed Christy by the Administrative law judge. Defendants have judgment against plaintiff Richard P. Christy in the amount of $2,500.00.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
GREAT FALLS DIVISION

RICHARD P. CHRISTY, THOMAS B. GUTHRIE and IRA PERKINS,		
Plaintiffs,	)	NO. CV-86-024-GF
vs.	)	
DONALD P. HODEL, Secretary of the Interior and THE UNITED STATES DEPARTMENT OF INTERIOR	)	MEMORANDUM AND ORDER
Defendants.	)	

The above-entitled action arises out of the Endangered Species Act (the "ESA"), codified at 16 U.S.C. §§1531, et seq. Plaintiffs Richard Christy, Thomas Guthrie and Ira Perkins filed suit against the United States Department of the Interior and its Secretary, Donald Hodel, seeking a declaration that the ESA and the grizzly bear regulations promulgated thereunder, 50 C.F.R. 17.40(b), violate rights guaranteed the plaintiffs under the United States Constitution. Jurisdiction vests with this court pursuant to 16 U.S.C. §1540(c), 5 U.S.C. §702 and 28 U.S.C. §1331.

The matter is before the court on defendants' motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure.[1] The motion is now ripe for disposition. The material facts preceding and arising from this lawsuit are not in dispute. Both plaintiffs and defendants admit to the following facts:

1. In the summer of 1982 Grizzly bears (ESA designation

1. The defendants have also moved the court to dismiss the complaint of plaintiffs Perkins and Guthrie for lack of jurisdiction under Artile [sic] III, §2 of the Constitution of the United States, upon the basis that no actual case or controversy exists between plaintiffs Perkins and Guthrie and the defendants. The court declines to address this motion in that it finds the summary judgment motion to be dispositive.

"Threatened Species") began killing sheep on plaintiff Christy's leased land. Initially, plaintiff lost approximately 20 sheep to the bears. Christy notified the United States Fish and Wildlife Service which made a futile attempt to capture and relocate the problem bears.

2. Subsequently, on the evening of July 9, 1982, Christy observed two Grizzly bears approaching his flock of sheep. Fearful that the bears were intent on attacking his sheep, Christy shot and killed one of the bears. The other bear fled.

3. Following the above attack, Christy lost an additional 64 sheep to bears before moving his flock from the leased land to prevent future losses. Christy stated he had no other suitable place to graze his flock, and therefore was forced to sell the remainder of his flock at slaughter value, absorbing a loss in excess of $10,000.00.

4. Subsequent to the killing of the Grizzly on July 9, 1982, the United States Department of Interior held Christy in violation of the ESA and applicable regulations, 16 U.S.C. §1540 (a); 50 C.F.R. 17.40(b). Following a hearing for relief, an administrative law judge ruled that Christy had knowingly taken a Grizzly bear in violation of the ESA, and ordered Christy to pay a fine of $2,500.00.

Plaintiffs Guthrie and Perkins have not been charged in violation of the ESA, but have allegedly lost sheep to attacking Grizzly bears. Accordingly, plaintiffs Guthrie and Perkins have joined plaintiff Christy in filing this lawsuit, contending the ESA and the Grizzly bear regulations promulgated thereunder, as applied to them by the defendants, are violative of their rights guaranteed under the United States Constitution.

Specifically, plaintiffs contend the ESA impinges upon their purported "fundamental right to possess and protect property." Consequently, plaintiffs submit that the ESA comes before the court with a presumption of unconstitutionality and that the burden of proof shifts to the defendants to show that: (1) Congress had a compelling interest in the ESA's passage; and (2) that Congress accomplished this interest in the least restrictive manner.

Upon review, the court finds itself unpersuaded by plaintiffs' arguments. Accordingly, this court refuses to recognize the existence of the "fundamental right to possess and pro-

tect property" asserted by the plaintiffs.

Since no fundamental right is impinged upon in the instant case, the ESA and Grizzly bear protective regulations need only rationally relate to a legitimate governmental interest.[2] In the Court's opinion, that requirement is clearly satisfied by the legitimate governmental concern of protecting threatened and endangered wildlife.

Plaintiffs' second basis for opposing defendants' summary judgment motion is that the only way to determine factual issues regarding the constitutionality of the ESA and its regulations is by "full-fledged" trial. The court disagrees. In the instant case, a full evidentiary hearing has already been held before an administrative law judge and the record of those proceedings is before this court.

Plaintiffs allege the loss of their property (i.e., sheep) to the protected Grizzly bears constituted a governmental taking requiring just compensation under the Fifth Amendment to the Constitution. In support, plaintiffs argue that, as a practical matter, the ESA and its regulations work to prevent them from protecting their sheep.

Of the courts that have considered whether damage to private property by protected wildlife constitutes a "taking," the clear majority has held that it does not, and that the government thus does not owe compensation. Mountain States Legal Foundation v. Hodel, 799 F.2d 1423, 1429 (10th Cir. 1986), cert. denied, U.S. , 107 S.Crt. 1616 (1987). See also, Bishop v. United States, 126 F.Supp. 449, 452-53 (Ct. Cl. 1954), cert. den., 349 U.S. 955 (1955); Sickman v. United States, 184 F.2d 616 (7th Cir. 1950), cert. den., 341 U.S. 939 (1951); Bailey v. Holland, 126 F.2d 317 (4th Cir. 1942); Jordan v. State, 681 P.2d 346 (Alaska App. 1984); Collopy v. Wildlife Commission, Etc., 625 P.2d 994 (Colo. 1981).

Because the court agrees with the rationale of the above-cited cases, it is compelled to conclude the ESA and its regulations do not, as a practical matter, constitute a governmental taking requiring compensation.

Plaintiffs next assert the ESA constitutes an unconstitutional delegation of legislative power. In the alternative, the plaintiffs argue that even if the delegation itself is valid, the Secretary of the Interior exceeded the authority granted him by the ESA when he promulgated the Grizzly bear regulations at issue. In the court's opinion, the ESA is a valid delegation of legislative authority. Furthermore, the regulations at issue are a rational reflection of Congressional will, properly promulgated under the authority vested in the Secretary of the Interior. Accordingly, plaintiffs' arguments fail as a matter of law.

Finally, plaintiffs assert this court should review, de novo, the fine imposed on Christy, pursuant to 16 U.S.C. §1540(a) and 50 C.F.R. §§11, et seq., for knowingly killing a Grizzly bear. Upon review, the court is compelled to conclude the fine is supported by substantial evidence contained within the administrative record. Therefore, this court hereby affirms the $2,500 fine assessed Christy by the administrative law judge.

For the reasons cited herein, the court hereby concludes no issues of material fact exist in the present case and, furthermore, defendants are entitled to judgment as a matter of law. Therefore, defendants' motion for summary judgment is hereby GRANTED.

The Clerk is directed to enter JUDGMENT accordingly.

IT IS SO ORDERED.

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2. See, *San Antonio Independent School District v. Rodriguez*, 411 U.S. ___1___ (1973).

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RICHARD P. CHRISTY; THOMAS B. GUTHRIE; IRA PERKINS,
Plaintiffs-Appellants,

v.

DONALD P. HODEL, Secretary of the Interior; UNITED STATES DEPARTMENT OF INTERIOR,
Defendants-Appellees.

No. 87-3998
D.C. No. CV-86-24-PGH
OPINION

Appeal from the United States District Court
for the District of Montana (Great Falls)
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted
August 5, 1988—Seattle, Washington

Filed September 21, 1988

Before: Arthur L. Alarcon and Robert R. Beezer, Circuit Judges, and Thelton E. Henderson,* District Judge.

Opinion by Judge Alarcon

*Honorable Thelton E. Henderson, United States District Judge for the Northern District of California, sitting by designation.

SUMMARY

Environmental Law/Constitutional Law

Affirming a judgment, the court held that the prohibition against killing protected wildlife in defense of private property violates neither due process nor equal protection.

Defending his sheep, appellee Richard Christy killed a grizzly bear. Appellee U.S. Department of the Interior assessed a civil penalty against Christy for killing the grizzly in violation of the Endangered Species Act (ESA) and the regulations promulgated by the Department. The grizzly bear is a threatened species; its taking is forbidden except in certain specified circumstances. Christy's appeal, arguing that the imposition of a penalty violated his alleged constitutional right to defend his sheep, was denied on the ground that the Department had no jurisdiction to determine the constitutionality of federal laws or regulations. Christy sued. Also named as plaintiffs were appellants Thomas Guthrie and Ira Perkins, fellow sheepowners. Plaintiffs seek a declaration that application of the ESA and the regulations to them in circumstances where they are defending their property is unconstitutional. Plaintiffs also seek declarations that the ESA contained an unconstitutinal delegation of legislative power to the Secretary and that the Secretary exceeded his delegated authority in promulgating the regulations. The district court granted defendants' motion for summary judgment. The court rejected plaintiffs' argument that there is a fundamental right to possess and protect property. The court held that damage to private property by protected wildlife does not constitute a taking. The court further concluded that the ESA is a valid delegation of legislative authority. Finally, the court affirmed the penalty.

[1] The right claimed by the plaintiffs in this action is the right to protect their property from immediate destruction

from federally protected wildlife. [2] The U.S. Constitution does not protect such a right. [3] Although grizzly bears may be taken in self-defense or in defense of others, the ESA makes no mention of a right to kill a member of a threatened species in defense of *property*. [4] The court also declined plaintiffs' invitation to construe the fifth amendment as guaranteeing the right to kill federally protected wildlife in defense of property. [5] Because killing of grizzly bears to protect sheep is not a fundamental right, the ESA and the grizzly bear regulations are not subject to strict scrutiny. [6] The court does not agree with appellants that the ESA and the regulations have no rational basis. Congress's intent in enacting the ESA was to halt and reverse the trend towards species extinction. The regulations advance this goal. [7] The first classification identified by plaintiff—persons raising livestock near grizzly bear habitat—is simply not a classification made by the ESA or by the grizzly bear regulations. [8] The second classification identified by plaintiffs is that which allows a certain group of people to hunt and kill grizzly bears for sport while withholding this same authority to livestock owners, even in defense of their stock. [9] This classification is neither suspect nor impairs the exercise of any fundamental right. Accordingly, the classification is subject to the rational basis test. [10] Plaintiffs argue that no rational basis supports the provision for sport hunting of grizzly bears. [11] Plaintiffs' argument is premised on the unsupported assumption that a program of carefully controlled killings of bears in limited geographic regions cannot promote conservation and, therefore, necessarily conflicts with the purpose of the ESA. However, population pressures within a given ecosystem may not be otherwise relieved except by regulated taking. [12] Plaintiffs contend that by protecting grizzly bears, the Department has transformed the bears into governmental agents who have physically taken plaintiffs' property without just compensation in violation of the fifth amendment. [13] The defendants properly focus on the regulations. The regulations themselves, however, do not purport to take, or even to regulate

the use of, plaintiffs' property. Plaintiffs err in attributing such takings to the government. [14] Numerous cases have considered, and rejected, the argument that destruction of private property by protected wildlife constitutes a governmental taking. [15] By limiting the Secretary's legislative authority to the promulgation of regulations that promote the conservation of threatened species, Congress has established a standard sufficiently definite and precise to permit the courts to determine whether the Secretary's enactments comport with congressional will. Thus, the ESA does not unconstitutionally delegate legislative authority to the Secretary. [16] Finally, the Secretary did not exceed his delegated authority in promulgating regulations providing for limited and controlled sport hunting of grizzly bears in designated geographic regions. n designated geographic regions.

COUNSEL

K. Dale Schwanke, and Sue Ann Love, Great Falls, Montana, for the plaintiffs-appellants.

Jacques B. Gelin, Department of Justice, Washington, D.C., for the defendants-appellees.

OPINION

ALARCON, Circuit Judge:

Plaintiffs-Appellants Richard P. Christy (Christy), Thomas B. Guthrie (Guthrie), and Ira Perkins (Perkins) appeal from the district court's grant of summary judgment in favor of Defendants-Appellees Donald P. Hodel, Secretary of the Interior (Secretary) and the United States Department of Interior (Department). The district court rejected plaintiffs' claim that the Endangered Species Act (ESA) and certain reg-

ulations promulgated thereunder are unconstitutional as applied because they prevent plaintiffs from defending their sheep by killing grizzly bears. The court also rejected plaintiffs' claims that the ESA unlawfully delegated legislative authority to the Secretary and that the Secretary exceeded his lawful authority in promulgating the regulations at issue. We affirm.

I. FACTS

Christy owned 1700 head of sheep. On or about June 1, 1982, he began grazing the sheep on land he had leased from the Blackfeet Indian Tribe. The land was located adjacent to Glacier National Park in Glacier County, Montana.

Beginning about July 1, 1982, bears attacked the herd on a nightly basis. The herder employed by Christy frightened the bears away with limited success by building fires and shooting a gun into the air. Christy sought assistance from Kenneth Wheeler, a trapper employed by the United States Fish and Wildlife Service. Wheeler set snares in an attempt to capture the bears.

By July 9, 1982, the bears had killed approximately twenty sheep, worth at least $1200. That evening, while Christy and Wheeler were on the leased land together, Christy observed two grizzly bears emerge from the forest. One of the bears quickly retreated to the trees. The other bear moved toward the herd. When the animal was 60-100 yards away, Christy picked up his rifle and fired one shot, which hit the bear. It ran a short distance, then fell to the ground. Christy approached the bear and fired a second shot into its carcass to ensure that it was dead.

Wheeler's subsequent efforts to capture any bears were unsuccessful. On July 22, 1982, the Tribe agreed to terminate the lease and to refund Christy's money. On July 24, 1982,

Christy removed his sheep from the leased land, having lost a total of 84 sheep to the bears during the lease term.

Pursuant to authority conferred by the ESA, the Secretary has listed the grizzly bear (Ursus arctos horribilis) as a threatened species throughout the 48 contiguous states. 50 C.F.R. § 17.11(h) (1987). Regulations promulgated by the Department forbid the "taking" of grizzly bears, except in certain specified circumstances. *See id.* § 17.40(b).[1]

The Department assessed a civil penalty of $3,000 against Christy for killing a grizzly bear in violation of the ESA and the regulations. On August 13, 1984, at Christy's request, the Department held an administrative hearing. At the hearing, Christy admitted that he had killed the bear knowing it to be a grizzly, but contended that he did so in the exercise of his right to defend his sheep. The administrative law judge (ALJ) upheld the imposition of a penalty but lowered the amount to $2,500.

Christy filed an administrative appeal, arguing that the imposition of a penalty violated his alleged constitutional right to defend his sheep. The appeal was denied on the ground that the Department had no jurisdiction to determine the constitutionality of federal laws or regulations.

On January 30, 1986, Christy instituted the present action. Also named as plaintiffs are Guthrie and Perkins, who have

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[1]The pertinent regulations are referred to throughout this opinion as "the grizzly bear regulations" or simply "the regulations."

"Taking," as defined in the ESA, means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." 16 U.S.C. § 1532(19) (1982). This case concerns only the *killing* of grizzly bears in defense of sheep. For the sake of precision, and to avoid confusion between plaintiffs' "taking" of grizzly bears and the government's alleged "taking" of plaintiffs' sheep without just compensation, our opinion shall refer to the "killing," rather than the "taking," of grizzly bears, except when quoting sources that use the latter term.

pastured flocks of sheep in Teton County, Montana. Guthrie and Perkins allege that they, too, have lost sheep to grizzly bears. They allege that they were informed by the United States Fish and Wildlife Service that they would be fined if they harmed or killed a grizzly bear, even in defense of their sheep. Guthrie alleges that, "[a]s a result of his losses to the grizzly bears and the harassment of the flock by the bears in the years 1984 and 1985, Guthrie sold all the merchantable sheep from his flock in 1985."

Plaintiffs seek a permanent injunction restraining defendants from enforcing the ESA and the grizzly bear regulations against them. Christy seeks a declaration that the Department's application of the ESA and the regulations to him in the administrative proceeding deprived him of "his fundamental right to possess and protect his property," deprived him of his property and liberty without just compensation or due process, and deprived him of equal protection of the laws. Guthrie and Perkins seek a declaration that the promulgation of the regulations was unconstitutional on the same grounds asserted by Christy. All plaintiffs seek a declaration that application of the ESA and the regulations to them in circumstances where they are defending their property is unconstitutional. Plaintiffs also seek declarations that the ESA contained an unconstitutional delegation of legislative power to the Secretary and that the Secretary exceeded his delegated authority in promulgating the regulations.

The Department filed a counterclaim against Christy seeking judgment in the amount of $2,500, plus interest, representing the unpaid penalty assessed against him by the ALJ. The Department lodged the administrative record with the district court.

On July 23, 1986, the defendants filed a motion for summary judgment. The defendants relied on the facts alleged in the complaint and on the administrative record. In response, plaintiffs asserted that "genuine issues of material fact exist as

to allegations of Plaintiffs' Complaint." Plaintiffs, however, submitted no affidavits or other evidence in opposition to the defendants' motion.

On May 4, 1987, the district court issued a Memorandum and Order granting the defendants' motion for summary judgment. The court found that "[t]he material facts preceding and arising from this lawsuit are not in dispute." The court ruled that the defendants were entitled to judgment as a matter of law. The court rejected plaintiffs' argument that there is a fundamental right to possess and protect property. Accordingly, the court evaluated the ESA and the grizzly bear regulations under the "rational basis" test and found that they satisfied that test. The court next rejected plaintiffs' contention that the loss of their sheep constituted a taking of their property by the federal government without just compensation. The court held that damage to private property by protected wildlife does not constitute a taking.

The court further concluded that "the ESA is a valid delegation of legislative authority," and that "the regulations at issue are a rational reflection of Congressional will, properly promulgated under the authority vested in the Secretary of the Interior." Finally, the court affirmed the penalty assessed against Christy by the ALJ, finding that it was supported by substantial evidence contained in the administrative record. Plaintiffs now appeal from the judgment entered against them.

II. JURISDICTION

This action arises under the United States Constitution and under the ESA, 16 U.S.C. §§ 1533(d), 1540(g) (1982). The district court had jurisdiction over the action pursuant to section 1540(g) and 28 U.S.C. §§ 1331, 1346(a)(2) (1982). We have jurisdiction over plaintiffs' appeal from the final judgment pursuant to 28 U.S.C. § 1291 (1982). The judgment was entered on May 4, 1987, and plaintiffs filed their notice of

appeal on June 30, 1987. Thus, the notice was timely filed. Fed. R. App. P. 4(a)(1).

III. DISCUSSION

A grant of summary judgment is reviewed de novo. *Coverdell v. Department of Social & Health Services,* 834 F.2d 758, 761 (9th Cir. 1987). We must determine, "viewing the evidence in the light most favorable to the nonmoving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* at 761-62.

Plaintiffs contend that entry of summary judgment was improper because "many genuine issues of material fact are unresolved." In their motion for summary judgment, the defendants relied on facts set forth in plaintiffs' own complaint, together with the administrative record. Plaintiffs submitted no evidence, by affidavit or otherwise, in opposition to the defendants' motion.

When a defendant's motion shows that there are no genuine issues of material fact, a plaintiff's unsupported assertion to the contrary is insufficient to forestall summary judgment. "Once the moving party shows the absence of evidence [to support the nonmoving party's case], the burden shifts to the nonmoving party to designate ' "specific facts showing that there is a genuine issue for trial." ' " *Id.* at 769 (quoting *Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986), quoting Fed. R. Civ. P. 56(e)). Because plaintiffs failed to demonstrate the existence of any genuine issues of material fact,[2] we

[2]Plaintiffs assert that whether the ESA and the grizzly bear regulations rationally further Congress's goal of conserving threatened species is a genuine issue of material fact. In assessing whether challenged legislation rationally furthers a legitimate governmental goal, the court will consider not only the basis on which the legislature actually acted, if ascertainable, but also *any hypothetical basis* on which it might have acted. "As long as there

need only determine whether the district court correctly applied the relevant law to the facts of record.

A. Do the ESA and the Regulations, as Applied, Deprive Plaintiffs of Property Without Due Process?

Plaintiffs contend that application of the ESA and the regulations so as to prevent them from defending their sheep against destruction by grizzly bears deprives them of property without due process, in violation of the fifth amendment.[3] The first step in our analysis is to determine the standard to be applied in reviewing the challenged legislation.

Strict judicial scrutiny of legislation that allegedly violates the due process clause is reserved for those enactments that "impinge upon constitutionally protected rights." *San Antonio Indep. School Dist. v. Rodriguez,* 411 U.S. 1, 40 (1973). When legislation impairs the exercise of a "fundamental" right, the government "must prove to the Court that the law is necessary to promote a compelling or overriding interest." 2 Rotunda § 15.4, at 59; *accord Beller v. Middendorf,* 632 F.2d 788, 808 (9th Cir. 1980), *cert. denied,* 452 U.S. 905, 454 U.S. 855 (1981).

On the other hand, when the legislative enactment infringes on no fundamental right, "the law need only ration-

is any conceivable basis for finding such a rational relationship, the law will be upheld." 2 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law: Substance and Procedure* § 15.4, at 59 (1986) [hereinafter Rotunda]; *id.* at 60 ("The law will be upheld so long as the justices can conceive of a basis for terming the classification rationally related to a legitimate end of government."). Since the court itself may postulate a basis for the legislation, satisfaction of the rationality test should be deemed a legal, rather than a factual, issue.

[3]The fifth amendment provides, in pertinent part: "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. V.

ally relate to any legitimate end of government." 2 Rotunda § 15.4, at 59; *accord Beller*, 632 F.2d at 808. The law will be upheld if the court can hypothesize any possible basis on which the legislature might have acted. *See supra* note 2.

[1] The right claimed by the plaintiffs in this action is the right "to protect their prop rty from immediate destruction from federally protected wildlife." In their opening brief, plaintiffs characterize this as a "natural and fundamental constitutional right." In their reply brief, plaintiffs backtrack somewhat, arguing that the right "should be deemed fundamental."

[2] Certain state courts have construed their own constitutions to protect the sort of right claimed by the plaintiffs in this case. *See, e.g., Cross v. State*, 370 P.2d 371, 376, 377 (Wyo. 1962) (due process clause in state constitution construed to guarantee "the inherent and inalienable right to protect property"); *State v. Rathbone*, 110 Mont. 225, _ , 100 P.2d 86, 90 (1940) (state constitution expressly guaranteed the right "of acquiring, possessing, and protecting property"); *see generally* Annotation, *Right to Kill Game in Defense of Person or Property*, 93 A.L.R.2d 1366 (1964). No court, however, has construed the United States Constitution to protect such a right. *See Mountain States Legal Found. v. Hodel*, 799 F.2d 1423, 1428 n.8 (10th Cir. 1986) (en banc) (noting the absence of authority on the question), *cert. denied*, 107 S. Ct. 1616 (1987).

[3] The ESA expressly provides that no civil penalty shall be imposed on a defendant who proves that, in killing a member of a threatened species, the defendant was acting in self-defense or in defense of others. 16 U.S.C. § 1540(a)(3) (1982); *see* 50 C.F.R. § 17.40(b)(1)(i)(B) (1987) ("Grizzly bears may be taken in self-defense, or in defense of others . . . ."). The defendant may raise the same defense in criminal prosecutions under the ESA. 16 U.S.C. § 1540(b)(3) (1982). The ESA makes no mention, however, of a right to kill a member of a

threatened species in defense of *property*.[4] One circuit court has opined that this omission evinces a congressional view that no such right exists under the United States Constitution. *See Mountain States*, 799 F.2d at 1428 n.8.

The U.S. Constitution does not explicitly recognize a right to kill federally protected wildlife in defense of property. Plaintiffs, nevertheless, urge that we infer such a right, in much the same way that the Supreme Court has inferred a constitutional right to privacy despite the absence of language expressly recognizing such a right. *See Griswold v. Connecticut*, 381 U.S. 479, 484-85 (1965) (state law forbidding married couples from using contraceptives violated constitutional right to privacy).

The Supreme Court has recently expressed reluctance "to discover new fundamental rights imbedded in the Due Process Clause." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986). The Court explained:

> There should be . . . great resistance to expand the substantive reach of [the due process clauses of the fifth and fourteenth amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority.

Id. at 195. The Court in *Bowers* refused to recognize a fundamental constitutional right of homosexuals to engage in sod-

[4] On the other hand, neither the ESA nor the regulations appear to forbid a property owner from attempting to fence out grizzly bears or to drive them away by nonharmful means. Indeed, in the present case, Christy's herder enjoyed limited success in driving bears away by building fires and shooting a gun into the air. Thus, it is inaccurate to say that the laws prevent an owner from defending his property against grizzly bears. The laws merely operate to bar certain means of defending property from grizzly bears.

omy, rejecting the argument that the constitutional right to privacy extended to protect such conduct. *Id.* at 190-94. The Court's reticence to "redefin[e] the category of rights deemed to be fundamental" is further manifested by the Court's refusal to find a fundamental right to such necessities as education, *Rodriguez,* 411 U.S. at 37, and adequate housing, *Lindsey v. Normet,* 405 U.S. 56, 74 (1972).

The Supreme Court's teaching is clear and unmistakable—federal courts should refrain from divining new fundamental rights from the due process clauses of the fifth and fourteenth amendments, at least when the claimed right is neither "implicit in the concept of ordered liberty," *Palko v. Connecticut,* 302 U.S. 319, 325 (1937), *overruled on other grounds, Benton v. Maryland,* 395 U.S. 784 (1969), or "deeply rooted in this Nation's history and tradition," *Moore v. City of East Cleveland,* 431 U.S. 494, 503 (1977) (op. of Powell, J.). Thus, we recently "heed[ed] the Supreme Court's counsels of caution" and refused to extend the right to privacy to include the right of a prison inmate to be free from a state official's unauthorized disclosure of intimate photographs of the inmate's wife. *Davis v. Bucher,* No. 87-3694, slip op. 9397, 9401, 9403 (9th Cir. Aug. 2, 1988).

[4] In light of the Supreme Court's admonition that we exercise restraint in creating new definitions of substantive due process, we decline plaintiffs' invitation to construe the fifth amendment as guaranteeing the right to kill federally protected wildlife in defense of property. In so doing, we do not minimize the seriousness of the problem faced by livestock owners such as plaintiffs nor do we suggest that defense of property is an unimportant value. We simply hold that the right to kill federally protected wildlife in defense of property is not "implicit in the concept of ordered liberty" nor so "deeply rooted in this Nation's history and tradition" that it can be recognized by us as a fundamental right guaranteed by the fifth amendment.

[5] Because of our determination that the killing of grizzly bears to protect sheep is not a fundamental right enjoyed by the plaintiffs, we are not required to subject the ESA and the grizzly bear regulations to strict scrutiny. Instead, we must determine whether those enactments rationally further a legitimate governmental objective.

Plaintiffs do not argue that preservation of threatened species is an impermissible objective, or that Congress lacks authority to pursue that objective. Plaintiffs contend, rather, that the ESA and the grizzly bear regulations do not rationally further that objective. Plaintiffs' position appears to be that regulations preventing citizens from protecting their property against depredating bears will inevitably generate a backlash, including "unlawful killings resulting from the gross unfairness of the existing system."

[6] We do not agree that the ESA and the regulations have no rational basis. Congress's intent in enacting the ESA was "to halt and reverse the trend towards species extinction, whatever the cost." *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 184 (1978). The regulations at issue plainly advance this goal by forbidding the killing of grizzly bears, except in certain limited circumstances. *See* 50 C.F.R. § 17.40(b)(1)(i) (1981).

The regulations recognize the concerns and accommodate the needs of owners of livestock and other property by authorizing the killing of "nuisance bears" by government officials when efforts to live-capture such bears have been unsuccessful. *See id.* § 17.40(b)(1)(i)(C). The regulations are reasonable in requiring private citizens to seek the assistance of experienced government officials, who may be expected to protect the public interest, rather than leaving every individual free to kill a "nuisance bear" whenever he or she deems it necessary. *See State v. Webber,* 85 Or. App. 347, 350-51, 736 P.2d 220, 222 (state statute requiring owner to obtain permit before killing depredating wildlife was "a reasonable restraint

on defendant's right to protect his property"), *review denied*, 304 Or. 56, 742 P.2d 1187 (1987).

Moreover, the regulations do not forbid plaintiffs from personally defending their property by means other than killing grizzly bears. *See supra* note 4; *see also Barrett v. State*, 220 N.Y. 423, _, 116 N.E. 99, 101-02 (1917) (state statute forbidding molestation or disturbance of wild beavers held constitutional because it left property owners free to fence their land or to drive away destructive beavers).

For the foregoing reasons, the ESA and the grizzly bear regulations, as applied to prevent plaintiffs from killing such bears in defense of their property, do not deprive plaintiffs of their property without due process of law.

B. Do the ESA and the Regulations, as Applied, Deny Plaintiffs Equal Protection of the Laws?

Plaintiffs also argue that the ESA and the grizzly bear regulations, as applied to prevent them from killing grizzly bears to protect their sheep against imminent destruction, deny them equal protection of the laws.

The due process clause of the fifth amendment has been construed to require the federal government to accord every person within its jurisdiction equal protection of the laws. *See Jimenez v. Weinberger*, 417 U.S. 628, 637 (1974) (referring to "the equal protection of the laws guaranteed by the due process provision of the Fifth Amendment"); *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954) (invalidating racial segregation of public schools under the fifth amendment); *Eskra v. Morton*, 524 F.2d 9, 13 (7th Cir. 1975) ("The United States, as well as each of the several States, must accord every person within its jurisdiction the equal protection of the laws.").

"[I]n order to subject a law to any form of review under the equal protection guarantee, one must be able to demonstrate

that the law classifies persons in some manner." 2 Rotunda § 18.4, at 343-44. A classification may be demonstrated in one of three ways: by showing that the law, on its face, employs a classification; by showing that the law is applied in a discriminatory fashion; or by showing that the law is "in reality . . . a device designed to impose different burdens on different classes of persons." *Id.* at 344.

Once a legislative classification has been demonstrated, it will be subjected to strict judicial scrutiny if it employs a "suspect" class or if it classifies in such a way as to impair the exercise of a fundamental right. 2 Rotunda § 15.4, at 60; *id.* § 18.3, at 323; *see Clark v. Jeter*, 108 S. Ct. 1910, 1914 (1988) ("Classifications based on race or national origin, and classifications affecting fundamental rights, are given the most exacting scrutiny.") (citations omitted). On the other hand, "where the law classifies persons on a non-suspect basis for the exercise of liberties which are not fundamental constitutional rights," the law will be upheld if it rationally relates to a legitimate governmental objective. 2 Rotunda § 15.4, at 60; *see Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (in the area of economics and social welfare, legislative classification satisfies requirements of equal protection if it has some "reasonable basis" and if any state of facts can be conceived to justify it).[5]

[7] Plaintiffs argue that the ESA and the grizzly bear regulations classify persons along two lines. "The first classification," they contend, "is between a group of persons who, like Plaintiffs, are raising livestock near grizzly bear habitat and all remaining citizens and taxpayers of the U.S." Plaintiffs have made no showing, however, that the ESA or the grizzly bear regulations employ such a classification. This is

[5]The Court applies a middle-level scrutiny to legislation that classifies individuals according to sex or legitimacy of birth. *Jeter*, 108 S. Ct. at 1914; 2 Rotunda § 18.3, at 326-27. Classifications of this sort are not involved in the present case.

certainly not a classification that appears on the face of the challenged enactments. Nor have the plaintiffs proffered any evidence to suggest that the prohibition on the killing of grizzly bears is applied with greater severity against persons raising livestock near grizzly bear habitat.[6] Finally, plaintiffs do not contend that the enactments constitute a device for imposing excessive burdens on such persons. In short, the first so-called classification identified by plaintiff—persons raising livestock near grizzly bear habitat—is simply not a classification made by the ESA or by the grizzly bear regulations.

[8] The second classification identified by plaintiffs "is that which allows a certain group of people to hunt and kill grizzly bears under certain conditions for sport while withholding this same authority to livestock owners like Plaintiffs, even in immediate defense of their stock." This classification appeared on the face of the regulations as they read at all times relevant to this case:

> *Northwestern Montana.* If it is not contrary to the laws and regulations of the State of Montana, a person may hunt grizzly bears in the Flathead National Forest, the Bob Marshall Wilderness Area, and the Mission Mountains Primitive Area of Montana: *Provided,* That if in any year in question 25 grizzly bears have already been killed for whatever reason in that part of Montana, including the Flathead

[6]Of course, persons raising livestock near grizzly bear habitat are more likely to find themselves restrained by the regulations than, for example, persons residing in large metropolitan areas far removed from bear country. By the same token, persons who travel by automobile are more likely to find themselves restrained by speed limits than persons who travel by bicycle. Plaintiffs cite no authority for the proposition that a regulation that is evenhanded on its face and that is applied equally to all who violate its provisions nevertheless denies equal protection of the laws simply because it is *likely* to be applied more frequently against members of some identifiable, nonsuspect class of persons.

> National Forest, the Bob Marshall Wilderness Area and the Mission Mountains Primitive Area, which is bounded on the north by the United States-Canadian Border, on the east by U.S. Highway 91, on the south by U.S. Highway 12, and on the west by Montana-Idaho State line, the Director shall post and publish a notice prohibiting such hunting, and any such hunting for the remainder of that year shall be unlawful . . . .

50 C.F.R. § 17.40(b)(1)(i)(E) (1981).

[9] Plaintiffs do not contend that the foregoing classification is "suspect," and no case so holds. Nor does this classification impair the exercise of any fundamental constitutional right. *See* Part III(A) *supra.* Accordingly, the classification should be upheld if it satisfies the "rational basis" test, *i.e.*, if any state of facts can be conceived to justify it.

[10] Plaintiffs argue that no rational basis supports the provision for sport hunting of grizzly bears: "Not only is the hunting of a threatened species *unrelated* to the goals of the Act, it is *in complete derogation* of its purposes, i.e. the preservation of threatened species. . . . Indeed, given the threatened nature of their existence, allowing hunters to take even one [grizzly bear] arguably would be in direct conflict with the Act. Since this classification is in complete contradiction of the purposes of the Act, it can in no way have even a rational relationship to the purposes of the Act, as a matter of law."

[11] Plaintiffs' argument is premised on the unsupported assumption that a program of carefully controlled killings of bears in limited geographic regions cannot promote "conservation" and, therefore, necessarily conflicts with the purpose of the ESA. On the contrary, Congress expressly contemplated that "in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved," conservation may require "regulated taking." 16

U.S.C. § 1532(3) (1982). Further, although it expressly prohibited the killing of *endangered* species, Congress delegated to the Secretary the task of determining whether the killing of *threatened* species should also be prohibited. *Compare id.* § 1538(a)(1)(B) (imposing general prohibition on killing of endangered species) *with id.* § 1533(d) (Secretary "shall issue such regulations as he deems necessary and advisable to provide for the conservation of" threatened species). Congress authorized, but did not require, the Secretary to forbid the killing of threatened species. *Id.* § 1533(d). This legislative scheme reflects Congress's conclusion that certain killings of a threatened species could be consistent with the goal of conserving that species.

The Secretary had a rational basis for authorizing "regulated taking" of grizzly bears, by means of sport hunting, in those regions specified in the regulations. The basis is set forth in Amendment Listing the Grizzly Bear of the 48 Coterminous States as a Threatened Species, 40 Fed. Reg. 31,734-35 (1975) [hereinafter Amendment]. Briefly, relying on investigations by Fish and Wildlife Service biologists, data submitted by the Governors of Colorado, Idaho, Montana, Washington, and Wyoming, and comments filed by interested members of the public, the Director of the Fish and Wildlife Service, on behalf of the Secretary, determined that "grizzly bear population pressures definitely exist in the Bob Marshall Ecosystem." *Id.* at 31,735. The Director considered easing such pressures through live-trapping and transplantation of the animals but rejected that approach as "too dangerous and too expensive to be used with sufficient frequency to relieve the . . . population pressures." *Id.* The Director concluded that "[a] limited amount of regulated taking is necessary." *Id.*

The Director then considered whether such regulated "taking" should be accomplished through the isolated killing of nuisance bears or through seasonal sport hunting. The Director concluded that isolated killings, while necessary,

were "not sufficient to prevent numerous depredations and threats to human safety. This is because the occasional killing of one bear does not create a fear of man among the grizzly bear population in general." *Id.* A carefully controlled seasonal hunt, on the other hand, would both relieve the population pressures and condition the bears "to avoid all areas where humans are encountered," thus minimizing human-bear contact and the resultant risks to both. *Id.* Accordingly, the Director ruled that the best system of relieving the population pressures in the Bob Marshall Ecosystem would be "to combine limited taking of specific nuisance bears with a closely regulated sport hunt." *Id.* The promulgated regulations strictly controlled the total number of bears killed each year by mandating the cessation of hunting in any year "where the total number of bears killed for whatever reason . . . reaches 25 bears for that year." *Id.*[7]

In light of the foregoing, the regulations authorizing a carefully controlled and limited sport hunt of grizzly bears in designated geographic regions had a rational basis. Plaintiffs have proffered no evidence to suggest otherwise. The classification employed by the regulations, therefore, does not deny plaintiffs equal protection of the laws.

---

[7]On the basis of information collected subsequent to the promulgation of the initial regulations, the Secretary redesignated the geographic regions within which sport hunting would be permitted and lowered the number of bears that may be taken each year. *See* Revision of Special Regulations for the Grizzly Bear, 51 Fed. Reg. 33,753 (1986). The Secretary specifically considered and rejected the argument "that it was preposterous, illogical, and inconsistent to permit hunting of a threatened species." *Id.* at 33,757. The Secretary relied on studies and data suggesting that a carefully controlled sport hunt would eliminate unwary bears, thereby minimizing bear-human contact over the long-run and promoting conservation of the total bear population. *Id.* at 33,755, 33,757.

C. Do the ESA and the Regulations Effect a "Taking" of Plaintiffs' Property Without Just Compensation, in Violation of the Fifth Amendment?

[12] The fifth amendment provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. This prohibition applies only to takings by the federal government. *See Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe*, 370 F.2d 529, 533 (8th Cir. 1967) (citing *Koch v. Zuieback*, 316 F.2d 1, 2 (9th Cir. 1963)).[8] Plaintiffs contend that by protecting grizzly bears, the Department has transformed the bears into "governmental agents" who have physically taken plaintiffs' property.

The defendants analyze this case under the principles applicable to regulatory takings. Plaintiffs, on the other hand, insist that their property has been *physically* taken, because their sheep have been "*destroyed, killed,* and *rendered absolutely useless* by the bear's act."

[13] The defendants properly focus on the regulations, promulgation of which constituted governmental action. The regulations themselves, however, do not purport to take, or even to regulate the use of, plaintiffs' property. The regulations leave the plaintiffs in full possession of the complete "bundle" of property rights to their sheep. Perhaps because plaintiffs recognize this fact, they choose to focus on the conduct of the bears. Undoubtedly, the bears have physically taken plaintiffs' property, but plaintiffs err in attributing such takings to the government.

[14] Numerous cases have considered, and rejected, the

[8]The fifth amendment's proscription against takings without just compensation is made applicable to state governments through the due process clause of the fourteenth amendment. *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980).

argument that destruction of private property by protected wildlife constitutes a governmental taking. The pertinent cases were recently summarized by the Tenth Circuit:

> Of the courts that have considered whether damage to private property by protected wildlife constitutes a "taking," a clear majority have held that it does not and that the government thus does not owe compensation. The Court of Claims rejected such a claim for damage done to crops by geese protected under the Migratory Bird Treaty Act in *Bishop v. United States*, 126 F. Supp. 449, 452-53 (Ct. Cl. 1954), *cert. denied*, 349 U.S. 955 (1955). The United States Court of Appeals for the Seventh Circuit rejected a similar claim under the Federal Tort Claims Act in *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939 (1951). Several state courts have also rejected claims for damage to property by wildlife protected under state laws. *See, e.g., Jordan v. State*, 681 P.2d 346, 350 n.3 (Alaska App. 1984) (defendants were not deprived of their property interest in a moose carcass by regulation prohibiting the killing of a bear that attacked the carcass because "their loss was incidental to the state regulation which was enacted to protect game"); *Leger v. Louisiana Department of Wildlife & Fisheries*, 306 So. 2d 391 (La. Ct. App.), *writ of review denied*, 310 So. 2d 640 (La. 1975) (because wildlife is regulated by the state in its sovereign, as distinct from its propriety [*sic*] capacity, the state has no duty to control its movements or prevent it from damaging private property); *Barrett v. State*, 220 N.Y. 423, 116 N.E. 99 (N.Y. Ct. App. 1917) (damage to timber by beavers not compensable because the state has a general right to protect wild animals as a matter of public interest, and incidental injury by them cannot be complained of); *see also Collopy v. Wildlife Commission, Department of*

Natural Resources, 625 P.2d 994 (Colo. 1981); *Maitland v. People,* 93 Colo. 59, 63, 23 P.2d 116, 117 (1933); *Cooke v. State,* 192 Wash. 602, 74 P.2d 199, 203 (1937); *Platt v. Philbrick,* 8 Cal. App. 2d 27, 30, 47 P.2d 302, 304 (1935). *But see State v. Herwig,* 17 Wis. 2d 442, 117 N.W.2d 335 (1962); *Shellnut v. Arkansas State Game & Fish Commission,* 222 Ark. 25, 258 S.W.2d 570 (1953).

Mountain States, 799 F.2d at 1428-29. The Tenth Circuit held that damage to private property caused by federally protected wild burros did not constitute a taking under the fifth amendment. *Id.* at 1431.

Plaintiffs do not challenge the constitutional power of Congress to enact legislation to protect threatened species. Yet plaintiffs would, in effect, require that the government insure its citizens against property damage inflicted by such species. The federal government does not "own" the wild animals it protects, nor does the government control the conduct of such animals.[9] *See Douglas v. Seacoast Products, Inc.,* 431 U.S. 265, 284 (1977) ("[I]t is pure fantasy to talk of 'owning' wild fish, birds, or animals. Neither the States nor the Federal Government . . . has title to these creatures until they are reduced to possession by skillful capture."). Plaintiffs assume that the conduct of the grizzly bears is attributable to the government but offer no explanation or authority to support their assumption.

Plaintiffs cite the following language from a recent Supreme Court opinion in support of their argument that the

[9]We note that plaintiffs do not contend, and the record does not show, that the federal government physically introduced any bears to the areas near plaintiffs' properties. Whether the government may be held responsible for damage caused by bears or other wild animals that have been relocated by the government, under a theory that such animals are instrumentalities of the government, is a question we do not decide.

government should compensate them for the killing of their sheep by grizzly bears: "It is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *First English Evangelical Lutheran Church v. County of Los Angeles,* 107 S. Ct. 2378, 2388 (1987) (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)). The foregoing principle is inapplicable to the present case, because neither the ESA nor the grizzly bear regulations "force" plaintiffs to bear any burden. The losses sustained by the plaintiffs are the incidental, and by no means inevitable, result of reasonable regulation in the public interest. As one state court has aptly noted:

> Wherever protection is accorded [to wild animals] harm may be done to the individual. Deer or moose may browse on his crops; mink or skunks kill his chickens; robins eat his cherries. In certain cases the Legislature may be mistaken in its belief that more good than harm is occasioned. But this is clearly a matter which is confided to its discretion. It exercises a governmental function for the benefit of the public at large, and no one can complain of the incidental injuries that may result.

Barrett v. State, 220 N.Y. at _ , 116 N.E. at 100.

For the foregoing reasons, we hold that the ESA and the grizzly bear regulations do not effect a taking of plaintiffs' property by the government so as to trigger the just compensation clause of the fifth amendment, and that the government is not answerable for the conduct of the bears in taking plaintiffs' property.

D. Does the ESA Unconstitutionally Delegate Legislative Authority to the Secretary?

The ESA provides that "[w]henever any species is listed as a threatened species . . . the Secretary shall issue such regula-

tions as he deems necessary and advisable to provide for the conservation of such species." 16 U.S.C. § 1533(d) (1982). Plaintiffs argue that the foregoing delegation of legislative power is unconstitutional because it "fails to provide the necessary standards either to direct the Secretary in the promulgation of the regulations, or for a reviewing Court to employ in examining the content of the regulations against the statutory authorization."

Although the Constitution vests "all legislative powers" in Congress, U.S. Const. art. I, § 1, Congress may "establish general standards and delegate to others the responsibility for effectuating the legislative policy." *Avoyelles Sportsmen's League, Inc. v. Marsh*, 715 F.2d 897, 916 (5th Cir. 1983) (citing *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 529-30 (1935)). A delegation of legislative authority will be upheld if the standards prescribed by Congress "are sufficiently definite and precise to enable Congress, the courts and the public to ascertain" whether regulations promulgated pursuant to that authority conform to the legislative will. *Yakus v. United States*, 321 U.S. 414, 426 (1944); *see Marsh*, 715 F.2d at 916.

The standards set forth in the ESA are sufficiently definite and precise to withstand constitutional attack. The challenged standard requires the Secretary to promulgate "such regulations as he deems necessary and advisable to provide for the conservation of" species that the Secretary has listed as threatened. 16 U.S.C. § 1533(d) (1982). The term "conservation" is defined to mean the bringing of a threatened species "to the point at which the measures provided pursuant to this chapter are no longer necessary." *Id.* § 1532(3). Congress provided the following examples of activities that constitute "conservation": "[A]ll activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within

a given ecosystem cannot be otherwise relieved, . . . regulated taking." *Id.*

[15] By limiting the Secretary's legislative authority to the promulgation of regulations that promote the "conservation" of threatened species, Congress has established a standard sufficiently definite and precise to permit the courts to determine whether the Secretary's enactments comport with congressional will. *See Sierra Club v. Clark*, 755 F.2d 608, 612-15 (8th Cir. 1985) (invalidating regulation on ground that it exceeded scope of Secretary's authority to provide for the "conservation" of threatened species). It is our conclusion that the ESA does not unconstitutionally delegate legislative authority to the Secretary.

E. Did the Secretary Exceed the Scope of His Delegated Authority in Promulgating Regulations Permitting Limited Sport Hunting of Grizzly Bears?

The grizzly bear regulations permit limited sport hunting of grizzly bears in specified geographic regions of Montana. *See* 50 C.F.R. § 17.40(b)(1)(i)(E) (1981) (quoted and discussed in Part III(B) *supra*). Plaintiffs argue that such regulations are contrary to the purpose of the ESA: "The hunting and killing of up to 25 grizzly bears each year cannot be deemed, under any imaginable set of circumstances, as providing for the *conservation* of grizzly bears."

Congress has expressly authorized the "regulated taking" of threatened species "in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved." 16 U.S.C. §§ 1532(3), 1533(d) (1982). Thus, the Secretary is authorized to permit "regulated taking," *e.g.* limited sport hunting, but he must first find that "population pressures within a given ecosystem cannot be otherwise relieved." *Sierra Club*, 755 F.2d at 613.

The Secretary has acted within the scope of his authority in this case. His subordinate, the Director of the Fish and Wildlife Service, expressly determined that the population of grizzly bears in the Bob Marshall Ecosystem created pressures that could not be relieved other than through carefully regulated sport hunting. *See* Amendment, 40 Fed. Reg. at 31,735. The regulations as promulgated reflected this determination, by limiting the hunting of grizzly bears to designated areas within the Bob Marshall Ecosystem. *See* 50 C.F.R. § 17.40(b)(1)(i)(E) (1981).[10] The Director's determination was supported by a detailed statement of reasons. *See* Amendment, 40 Fed. Reg. at 31,735. Plaintiffs have proffered no evidence to raise a genuine issue of fact concerning the validity of the Secretary's stated reasons.

[16] In summary, the Secretary did not exceed his delegated authority in promulgating regulations providing for limited and controlled sport hunting of grizzly bears in designated geographic regions of Montana.

IV. CONCLUSION

For the reasons set forth herein, we AFFIRM the district court's entry of summary judgment in favor of defendants.

[10]In 1986, the regulations were amended to redesignate the geographic areas within which hunting of grizzly bears is permitted. *See supra* note 7. Plaintiffs do not challenge the amendment or the designation of certain hunting areas rather than others. Plaintiffs challenge the Secretary's authority to permit any hunting of grizzly bears.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD P. CHRISTY; THOMAS B. GUTHRIE;	)	NO. 87-3998 D.C. NO. CV-86-24-PGH
Plaintiffs-Appellants,	)	
vs.	)	O R D E R
DONALD P. HODEL, Secretary of the Interior; UNITED STATES DEPARTMENT OF INTERIOR,	)	
Defendants-Appellees.	)	

Appeal from the United States District Court
for the District of Montana (Great Falls)
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted August 5, 1988
Seattle Washington
Filed September 21, 1988

Before: ALARCON and BEEZER, Circuit Judges, and
HENDERSON* District Judge

Appellants' petition for rehearing is denied.

Filed November 3, 1988

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RICHARD P. CHRISTY;)
THOMAS B. GUTHRIE;) NO. 87-3998
IRA PERKINS,)

Plaintiffs-Appellants,)

D.C. NO. CV-86-24-PGH

DONALD P. HODEL, Secretary of)
the Interior; UNITED STATES)
DEPARTMENT OF INTERIOR,)

ORDER

Defendants-Appellees.

Appeal from the United States District Court
for the District of Montana (Great Falls)
Paul G. Hatfield, District Judge, Presiding

Argued and Submitted August 5, 1988
Seattle, Washington
Filed September 21, 1988

Before: ALARCON and BEEZER, Circuit Judges, and
HENDERSON* District Judge

Appellants' "Motion to Reconsider the Order Denying Appellants' Petition for Rehearing and to Stay Mandate Pending Consideration of Motion to Reconsider," filed November 14, 1988 is denied. Mandate shall issue forthwith.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 87-3998

RICHARD P. CHRISTY, THOMAS B. GUTHRIE
and IRA PERKINS,

Appellants.

vs.

DONALD P. HODEL, Secretary of the Interior
and THE UNITED STATES DEPARTMENT OF INTERIOR,

Appellees.

AFFIDAVIT OF RICHARD P. CHRISTY

STATE OF MONTANA)
: ss
County of Teton)

RICHARD CHRISTY, being first duly sworn, deposes on oath and says:

1. I am one of the Appellants in the above entitled matter. As is more specifically set forth in the Complaint which was filed in this matter, my bringing this action stems from Defendants' having assessed a civil penalty against me for shooting a grizzly bear when it was making an attack on my flock of sheep which were pastured on land leased by me from the Blackfeet Tribe, which land is located on the north side of Chief Mountain.

2. As is set forth in the Complaint (para. 7.0), I began leasing this land in the summer of 1982 after having been assured by the previous lessee that there had been very minimal pro-

blems with black bears on the land prior to my having leased it. However, shortly after my having moved my flock onto the leased land, I heard rumors that this area on Chief Mountain had in the past served as a place where government officials had been transplanting grizzly bears who had already killed sheep in other areas.

3. In reading the Opinion of this Court dated September 21, 1988, I noted a reference in footnote 9 to the question of whether any of the depredating grizzly bears may have been relocated or transplanted by the government. Specifically this Court noted that:

> ... the record does not show, that the federal government physically introduced any bears to the areas near plaintiffs' properties. Whether the government may be held responsible for damage caused by bears or other wild animals that have been relocated by the government, under a theory that such animals are instrumentalities of the government, is a question we do not decide.
> [Opinion, p.11901, footnote 9]

4. This entry coupled with my recollection of having heard the rumors in 1982 that sheep-killing grizzly bears had been transplanted onto Chief Mountain caused me to talk recently with Ken Wheeler, government trapper. Mr. Wheeler is the government trapper referred to in paragraph 7.1 of the Complaint, who had made numerous, but futile attempts to capture the grizzly bears who were depredating my flock on Chief Mountain, prior to my having shot the grizzly which is the subject of this action.

5. During this recent conversation I understood Mr. Wheeler to say that during the summer or fall of 1981, he personally, acting as government trapper, had transferred two sheep-killing grizzly bears onto or near the area which I had leased from the Blackfeet Tribe on the north side of Chief Mountain.

6. Wheeler told me that written documentation is kept of all such transfers of grizzly bears.

7. Based upon what Mr. Wheeler told me during this recent conversation, there is in my mind, a very real issue as to whether or not the grizzly bears which were depredating my flock in 1982, and in particular the grizzly bear which was shot by me, had been transplanted into this area by the government. Had we been afforded the opportunity to pursue discovery in this district court, we could have obtained the documentation necessary to establish whether the bears causing damage had in fact been relocated into the area by the government.

Further Affiant sayeth not.

RICHARD P. CHRISTY
SUBSCRIBED AND SWORN TO before me this 3rd day of November, 1988.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
NO. 87-3998

RICHARD P. CHRISTY, THOMAS B. GUTHRIE and IRA PERKINS,

Appellants.

vs.

DONALD P. HODEL, Secretary of the Interior and THE UNITED STATES DEPARTMENT OF INTERIOR,

Appellees.

AFFIDAVIT OF SUE ANN LOVE IN SUPPORT OF APPELLANTS' MOTION TO RECONSIDER THIS COURT'S ORDER DENYING APPELLANTS' PETITION FOR REHEARING

STATE OF MONTANA)
: ss
County of Cascade)

SUE ANN LOVE, being first duly sworn, deposes on oath and says:

1. I am one of the Attorneys for the Appellants in the above entitled matter. At the time of the filing of the Appellants' Petition for Rehearing, neither I nor co-counsel, K. Dale Schwanke, had ever received any information from our clients or any other source which in any way indicated that the grizzly bear shot by Appellant Christy and which is the subject of this ac-

tion, had or may have been transplanted by the government onto the area where it was depredating Christy's flock of sheep. In fact, it was not until late October, 1988, that our client, Appellant Richard P. Christy, first informed us of a conversation which he had just recently had with government trapper, Ken Wheeler, wherein Wheeler informed Christy that Wheeler had been involved in relocating sheep-killing grizzlies onto this area prior to the date on which Christy shot the grizzly bear.

2. After having received this information by mail from Mr. Christy, I personally telephoned government trapper Ken Wheeler and his supervisor Carter Niemeyer and confirmed this information. After doing so, I prepared an Affidavit for Mr. Christy and mailed it to him. Mr. Christy signed the Affidavit and sent it back to me by return mail. I received Mr. Christy's Affidavit on the same day (November 7, 1988) as I received the Court's Order denying our Petition for Rehearing.

3. During my telephone conversation with Mr. Wheeler, he informed me that he personally had transplanted two sheep-killing grizzly bears from an area near the Milk River Ridge on the Cut Bank Creek drainage onto Oil Well Road on the north slope of Chief Mountain. (Appellant Christy shot the grizzly bear on the north side of Chief Mountain.) Wheeler said that he did not recall exactly what year that was, but he would have to say that it was before 1981. Wheeler said that he was always required to complete very detailed records concerning each and every bear that was moved, including the bear's age, weight, sex, identification numbers, tatoos, etc. Wheeler said that complete records pertaining to all of these grizzly bear relocations could be found in his agency's animal damage control office in Billings.

4. Subsequent to my conversation with Mr. Wheeler, I spoke to his supervisor Mr. Niemeyer. Mr. Niemeyer confirmed this information and I understood him to say that prior to the time Mr. Christy had shot the grizzly bear which is the subject of this action, the area on which Mr. Christy shot the grizzly bear had been a common dumping ground for problem grizz-

ly bears. He also informed me that his office was required to keep records of any relocation of problem bears which it carried out and that such records would be available through Defendants' offices.

Further Affiant sayeth not.

SUE ANN LOVE

SUBSCRIBED AND SWORN TO before me this 7th day of November, 1988.

UNITED STATES DEPARTMENT OF THE INTERIOR
OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138-1194
(Phone: 801-524-5344)

March 14, 1985

U.S. FISH & WILDLIFE SERVICE	: Docket No. DENVER 84-1
	: Civil Penalty Proceeding
Complainant	: Endangered Species Act of
v.	: 1973, 87 Stat. 884,
	: 16 U.S.C. §§ 1538-1540
RICHARD PAUL CHRISTY	
	: INV 8-23014
Respondent	

DECISION

Appearances: Curtis Menefee, Esq., Office of the Solicitor, Department of the Interior, Denver, Colorado for complainant

Dale Schwanke, Esq., and Sue Ann Love, Esq., of the Law Firm Jardine, Stephenson, Blewett & Weaver, Great Falls, Montana for respondent

Before: Administrative Law Judge Sweitzer

These proceedings are governed by the provisions of the Endangered Species Act of 1973, as amended, 16 U.S.C. §§ 1531-1543, and Title 50 CFR, Subchapter B.

Complainant issued to Richard Paul Christy a Notice of Violation, dated February 7, 1983, alleging that:

> On or about July 9, 1982, while subject to the jurisdiction of the United States, Respondent did shoot and kill a grizzly bear Ursus arctos, near Chief Mountain on the Blackfeet Indian Reservation, in Glacier County, Montana, thus, violating the Endangered Species Act. Respondent violated Section 1538(a)(1) of Title 16 of the United States Code which makes it unlawful to take any endangered species, fish or wildlife.

The Notice of Violation was answered with a Petition for Relief, dated March 10, 1983. A Notice of Assessment was subsequently given on September 15, 1983, assessing a civil penalty of $3,000.00. (The Notice of Assessment also refined the species designation to Ursus arctos horribilus, whereas the Notice of Violation only designated Ursus arctos).

On October 31, 1983, respondent filed a request for hearing. A hearing was scheduled for May 9, 1984. At the request of respondent it was postponed, and was held on August 13, 1984, at Great Falls, Montana. Oral argument was waived, and post-hearing briefs were filed by both parties as follows: Complainant's Posthearing Brief, October 9, 1984; Respondent's Answer Brief, November 14, 1984; Complainant's Reply Brief, November 28, 1984.

The Law and Regulations

Grizzly bears are listed as an endangered or threatened species at 50 CFR 17.11, in accordance with 16 U.S.C. §1533(c). The sub-species of grizzly bear involved in this case, Ursus arctos horribilis, is a threatened species. The Secretary of the Interior can regulate any threatened species in the same manner an endangered species can be regulated under 16 U.S.C. §1538. The statutory authority states:

> Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibitd [SIC] under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species. 16 U.S.C. §1533(d).

In relevant part, said section 1538(a)(1) provides:

> [W]ith respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to--
>
> * * * take any such species within the United States or the territorial sea of the United States. 16 U.S.C. §1538(a)(1)(B).

The regulations for threatened species (50 CFR, Part 17, Subpart D) have been promulgated under the Endangered Species Act, supra, by the Secretary of the Interior. Certain threatened species have special rules governing their existence (found in 50 CFR 17.40-17.48). These special rules contain all the prohibitions and exceptions applicable to the threatened species, to the exclusion of all other rules. 50 CFR 17.31(c.).

The special rule applicable to grizzly bears is located at 50 CFR 17.40(b). This regulation states that no grizzly bear shall be taken, except as provided in specified subsequent exceptions. Thus, the illegal taking of an endangered species as found in 16 U.S.C. §1538, applies to this threatened species, the grizzly bear.

Two of the specified exceptions to the taking of a grizzly bear were, at one time or another, asserted in this case. The applicable portions of the regulations are as follows:

> Grizzly bears may be taken in self-defense, or in defense of others, but any such taking shall be reported in writing to the United States Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 19183, Washington, D.C. 20036, and to appropriate State officials, within 5 days after it occurs. 50 CFR 17.40(b)(1)(i)(B).

Removal of nuisance bears. A grizzly bear constituting a demonstrable but non-immediate threat to human safety, or committing significant depredations to lawfully present livestock, may be taken, but only if:

(1) it has not been reasonably possible to eliminate such threat or depredation by live-capturing and releasing unharmed in a remote area the grizzly bear involved; and

(2) the taking is done in a humane manner by authorized Federal or State employees; and

(3) the taking is reported in writing to the United States Fish and Wildlife Service, Division of Law Enforcement, P.O Box 19183, Washington, D.C. 20036, and to appropriate State officials, within 5 days after it occurs. 50 CFR 17.40(b)(1)(i)(C).

The penalty and enforcement provision of the Endangered Species Act is found at 16 U.S.C.§1540. It states that "[A]ny person who knowingly violates, and any person engaged in business as an importer or exporter of fish, wildlife, or plants who violates, any provision of this chapter" may be assessed a civil penalty up to $10,000.00 for each violation. 16 U.S.C. §1540(a)(1).

The Facts

The record shows the following to be the facts surrounding the killing of the grizzly bear on July 9, 1982. Respondent obtained a lease from the Blackfeet Indian Tribe to graze his sheep on lands held in trust by the United States of America for the use and benefit of the Tribe. The leased land was located adjacent to Glacier National Park in Glacier County, Montana. The term of the lease was from June 1, 1982 until sometime in October of 1982. Prior to entering into the lease, respondent contacted a prior lessee to inquire about possible predation. He was informed that bear problems were minimal, however, no sheep had been on the land for the past three to five years. Respondent moved approximately 800 ewes and 900 lambs onto the leased land. (Tr. 49-51).

On June 14, 1982, soon after the sheep were moved onto the leased land, a bear of undetermined species attacked the herd, and respondent killed it. (Tr. 52-53). The carcass of the bear was given to a group of persons who were never identified or located. Mr. Wayne Hamby, then Criminal Investigator for the Bureau of Indian Affairs, was informed of the incident, and on June 16, 1982, advised respondent that he was not allowed to hunt or kill any wildlife on the Reservation, and warned him especially against shooting grizzly bears as they are a threatened species. (Tr. 9). Respondent then left the leased land, leaving his herder in charge of the sheep. Respondent reported that there were no significant problems between June 14, 1982 and approximately July 1, 1982. (Tr. 54).

Beginning around July 1, 1982, respondent's herder began experiencing nightly attacks on the sheep. (Tr. 54-55).

The herder was frightening the bears away with limited success by building fires and shooting his gun in the air. (Tr. 27). Mr. Kenneth Wheeler, a government trapper employed by the U.S. Fish and Wildlife Service and responsible for animal damage control, was contacted to assess the situation and to remedy the problem. (Tr. 54). Mr. Wheeler had warned respondent in mid-June against having his sheep in the area as there would likely be many bears there. (Tr. 14). Mr. Wheeler identified the animals attacking the sheep as being two black bears and two grizzly bears. This information was given to respondent on July 6, 1982. (Tr. 55). Snares were set by Mr. Wheeler about July 5, 1982 in an attempt to live-capture the bears. (Tr. 15-16). The snares were checked twice daily. By July 9, 1982, respondent had lost approximately twenty head of sheep. (Tr. 56).

Respondent returned to the leased grazing area on July 9, 1982. (Tr. 55-56). He was aware of the nightly attacks on his sheep and felt that his herder had been pushed to the limit. (Tr. 56). Mr. Wheeler arrived there later that evening to check his snares and learned that earlier in the day respondent had shot two black bears. (Tr. 16-17; 60). After resetting his snares, Mr. Wheeler and respondent went to the camp area near the sheep wagon. Respondent then observed two grizzly bears emerge from the edge of the forest. (Tr. 60-61). One of the bears went back into the heavy trees, so that when Mr. Wheeler turned, he observed only one grizzly bear. The bears were between 60-100 yards away and moving in their general direction. (Tr. 18; 60-61). The grizzlies were not moving toward the sheep. The grizzly bear Mr. Wheeler observed was not acting aggressively toward the herd. (Tr. 18). While there is discrepancy between the testimony of the respondent and the government trapper as to what respondent stated and exactly what he did immediately after he observed the bears, it is undisputed that respondent picked up his rifle, moved to a position where he could shoot, and fired one shot at the bear that remained visible. The shot hit the bear and it ran a short

distance before falling down. The length of time between respondent's sighting of the bears and the time that he fired his rifle and killed the grizzly bear was somewhere between 15 seconds to 1 minute. Thereafter, Mr. Wheeler kept a lookout for the other bear while respondent went down and fired his shotgun into the bear to ensure that it was dead. (Tr. 17-20; 60-63). The other grizzly bear returned three times that same night and was chased away each time. (Tr. 63-64).

The killing of sheep continued and further unsuccessful attempts were made by Mr. Wheeler to live-capture the remaining grizzly bear. (Tr. 36-37; 64-67). On July 15, 1982, respondent requested that the Tribe terminate his lease and refund his money. The request was granted on July 22, 1982. (Tr. 66). Respondent moved his sheep out of the leased land on July 24, 1982. Respondent allegedly lost 44 ewes and 40 lambs during the duration of the lease. (Tr. 66). The majority of this loss apparently came after the grizzly bear had been shot on July 9, 1982, since respondent testified that approximately 20 sheep were taken by July 9, 1982.

Evaluation

The entire record of the case has been fully considered. Findings of fact and conclusions of law are set out hereinafter. In all instances where these findings and conclusions are inconsistent with those proposed by counsel in briefs, those proposals are rejected because they are deemed immaterial or not supported by the evidence.

At the outset of the hearing, counsel for respondent announced that any defense of self-defense was being withdrawn, and that respondent would defend solely on the grounds that he had the right to take the grizzly bear to protect his property. (Tr. 4). Respondent's Answer Brief alleges that the Endangered Species Act and regulations promulgated thereunder as applied to respondent under the facts of this case are unconstitutional in that they: 1) unreasonably deprive him of his constitutional right to protect his property, 2) operate to deprive him

of his property without due process of law, and 3) involve the taking of his property for public use without just compensation. (Respondent's Answer Brief p.4).

The Department of the Interior, as an agency of the executive branch of the Government, is without jurisdiction to consider whether or not a statute enacted by Congress is constitutional. United States v. Imperial Gold, Inc., 64 IBLA 241, 245-46 (1982), and cases cited therein. Neither may the question of validity of the implementing Departmental regulations be considered here. Lynn Keith, 88 I.D. 369, 372 (1981), and cases cited therein. Thus the only question to be decided in this forum is whether respondent knowingly took a grizzly bear in violation of section 1538(a)(1)(B) of Title 16 of the United States Code, and if so, whether the penalty assessed him is appropriate under the circumstances.

Subsequent to respondent's killing of a bear of undetermined species on June 14, 1982, he was contacted by two federal employees. Mr. Wheeler, the animal damage control specialist from the Fish and Wildlife Service, told respondent that he shouldn't have his sheep in that area as there was sure to be a high bear population. (Tr. 14). Mr. Hamby, a Criminal Investigator for the Bureau of Indian Affairs, was also contacted about the incident, and warned respondent on June 16, 1982, against hunting or killing any wildlife on the Reservation, and particularly against shooting grizzly bears, a threatened species. (Tr. 9).[1] Thus respondent had actual knowledge that the taking of a grizzly bear was illegal.

There is no question that the respondent knew he was shooting

1. Counsel for respondent asked respondent whether he was advised by "Mr. Hamby" about "the potential problems with wildlife in the area," to which respondent answered in pertinent part: "Mr. Hamby did not advise me that there were many bear in the area" (Tr. 51-52). In fact, it was Mr. Wheeler, not Mr. Hamby, who advised respondent that "he shouldn't have his sheep in this area in the high bear population and there had to be lots of bear in the area" (Tr. 14). Mr. Hamby told him that "non-members of the Tribe wasn't allowed to do any hunting or killing of wildlife on the [Blackfeet] Reservation, and particularly Indian people also couldn't shoot grizzly bears, because they were a threatened species" (Tr. 9).

at a grizzly bear on July 9, 1982. Upon seeing the bears emerge from the timber that evening, respondent recalls saying "There is two grizzlies." (Tr. 61). Mr. Wheeler also identified the bear he observed as a grizzly. (Tr. 18). Further describing the incident, respondent testified, "I jumped up from the table, grabbed my rifle, that was laying on the hood of the pickup. I ran over 10 feet from the table and shot the bear within seconds, I don't know how long, 15, 20 seconds, 30 seconds." (Tr. 61-62). The uncontradicted testimony of respondent and Mr. Wheeler who was present when the shooting took place, leaves no doubt that respondent shot the grizzly bear.

Respondent alleges that he has a right to protect his own property from destruction and that the provisions of the Endangered Species Act must be read to recognize this right. (Respondent's Answer Brief p.4). However, the regulations promulgated under the Endangered Species Act contain no such provision. A grizzly bear may be taken in self-defense or defense of others under 50 CFR 17.40(b)(1)(i)(B), supra,[2] a situation not argued in this case.[3]

The provision regarding removal of nuisance bears, 50 CFR 17.40(b)(1)(i)(C), supra, sets out specific circumstances, procedures, and proper authority, for lawful taking. The bear must be committing significant deprivations [sic] to lawfully present livestock. Then it may be taken only if it has not been reasonably possible to eliminate the threat by live-capture, and the taking is done by an authorized person. The taking must also be reported to the appropriate authorities. Whether there was significant deprivations [sic] to respondent's livestock, and whether or not a sufficient attempt had been made to live-capture the grizzly bears, was not argued by either counsel. Respondent clearly was not an authorized per-

2. For an example, see Administrative Law Judge decision, *U.S. Fish and Wildlife Service v. Ronald Lewis Matthew*, Docket No. DENVER 84-2, INV 8-21338 (November 30, 1984). That decision found respondent therein was justified in shooting a grizzly bear because he was acting in self-defense or defense of others.

3. As mentioned earlier in this decision, respondent specifically withdrew any defense of self-defense or defense of others, and defended "solely on the grounds that he had the right to take this bear to protect his property" (Tr. 4).

son under the regulation to take the grizzly, and as testified by Mr. Wheeler, the government does not authorize anyone in respondent's situation to kill a nuisance grizzly bear. (Tr. 33).

The testimony from the proceedings leaves little doubt that this was not a case of necessity for immediate defense of property. Respondent introduced into evidence a drawing depicting the surrounding area where the incident took place. (Exh. A). It identified where the sheep were bedded down on July 9, 1982, the location of the wagons and vehicles, and where the shooting occurred. Mr. Wheeler verified the accuracy of the map. (Tr. 34). He testified that the bear he observed was 90-100 yards away from the sheep and was not acting aggressively toward the sheep. (Tr. 18). Respondent twice stated that the bear was coming in his direction or towards him. (Tr. 60-61). Exhibit A illustrates that the location of the sheep was in a different direction, and that movement of the bear towards respondent excludes the possibility that the bear was heading toward his sheep. In various documents filed in conjunction with this incident, there do seem to be inconsistent statements as to the direction the bear was moving. In its Notice of Assessment (p.2), the Department asserted that the bear appeared to be heading toward the sheep. The Petition for Relief by respondent claims self-defense and defense of others, implying that the bear was coming in their direction. This defense was withdrawn by respondent at the outset of the hearing (see footnote 3, supra). In Respondent's Answer Brief (p.3) it is asserted that the grizzly bear was moving in the direction of the sheep. The testimony at the proceeding and the Exhibit A drawing by respondent establish that the bear was not moving in the direction of the sheep herd, nor was it near the area where the bears had been entering the sheep bedding grounds on previous asserted attacks of the herd. Respondent, in conjunction with his testimony of the incident, indicated with an arrow drawn on the Exhibit A map the direction the grizzly was taking immediately before it was shot, and it was not moving toward the sheep. (Tr. 61).

The pertinent regulation (50 CFR 17.40(b)(1)(i)(C), supra)

specifically sets out limited circumstances in which a nuisance grizzly bear can be taken by duly authorized Federal or State employees. Respondent was not one of those authorized persons, and it is not even clear that a taking of the grizzly by an authorized person would have been justified under the circumstances. The bears had previously been frightened away with at least some success. The grizzly bear that was not shot returned to the sheep herd and was chased away three times the night of July 9, 1982, after the other grizzly had been shot. This suggests the first grizzly bear might also have been chased away and not shot. Clearly, the regulation for the taking of a nuisance grizzly bear was not followed by respondent.

Having determined that respondent knowingly took a grizzly bear in violation of the Endangered Species Act and the regulations promulgated thereunder, the final determination to be made is whether the penalty assessed was appropriate in the circumstances. The Act, in 16 U.S.C. §1540, supra, authorizes the maximum civil penalty of $10,000 per violation. In this case, respondent's assessment was for slightly less than one-third of that amount. Assumably, the Fish and Wildlife Service did not feel that this was the type of incident that required the maximum penalty and reduced the assessment accordingly.

Other than taking the grizzly, respondent was reasonable in his actions and did attempt to mitigate damages. Before the grizzly killing, he contacted the prior lessee in order to check for possible predation problems. (Tr. 50). After the killing, he terminated the lease and removed his sheep herd in a timely manner. (Tr. 66). There were no aggravating circumstances such as joy killing or trophy hunting of this threatened species. Respondent was cooperative with the investigation of the incident. (Tr. 45).

There was a substantial time delay by the Fish and Wildlife Service in the assessment process. Well over a year elapsed from the date of the incident until the Notice of Assessment was filed. This delay was not satisfactorily explained. (See, e.g., Tr. 46-47). However there is no indication of any injustice resulting from this delay.

There were several circumstances that indicate respondent was "quick on the trigger." When he moved his sheep onto the leased land in June of 1982, a bear of undetermined species attacked his herd and he killed it. Respondent testified "At the time I didn't realize that black bears came in any other color besides black, so we assumed this bear could have been a grizzly * * *." (Tr. 53).

Respondent was warned against killing bears and particularly grizzlies, yet he thereafter did kill the grizzly and two black bears. The penalty determined by this decision in no way attempts to penalize respondent for shooting the black bears. Nevertheless, a general disregard for game protection laws, and thus a possible intent to shoot promiscuously, is suggested by the fact that the black bears were killed following the warning. Moreover, respondent evidently never did make an effort to have the bear taken by proper authorities under the cited regulation.

The loss of property suffered by respondent was substantial. Approximately 20 sheep had been killed when the grizzly was taken on July 9, 1982. (Tr. 56). Respondent estimated his total loss at $10,000. (Tr. 66). In considering the appropriate penalty, these facts have been taken into account. However, the penalty imposed must have a deterrent effect and not merely be a factor in a cost benefit analysis when private property is being menaced by a threatened species. If a substantially reduced penalty were assessed, respondent and others similarly situated might vention of the Endangered Species Act, and without complying with appropriate regulations promulgated thereunder, if their property is being endangered or destroyed. Proven violations of the Endangered Species Act must receive substantial sanctions in order to implement the dictates of the Act. Notwithstanding, considering all the circumstances, including the mitigating aspects discussed above, I am of the view that a penalty of twenty-five percent of maximum is more fitting than the thirty per cent of maximum imposed by complainant. Therefore a penalty of $2,500 is deemed appropriate.

Conclusion and Order

I conclude that: a) this is not the proper forum to consider whether the Endangered Species Act and regulations promulgated thereunder are unconstitutional; b) respondent knowingly took a grizzly bear in violation of section 1538(a)(1)(B) of Title 16 of the United States Code; c) proper procedures for the removal of nuisance grizzly bears (found at 50 CFR 17.40(b)(1)(i)(C)) were not followed; and d) the assessment of $3,000 should be reduced to $2,500, the latter being deemed a more reasonable penalty to be imposed under the circumstances.

Therefore respondent is ordered to pay complainant a civil penalty of Two Thousand Five Hundred Dollars ($2,500.00).

Harvey C. Sweitzer
Administrative Law Judge

Appeal Information

This decision may be appealed in accordance with Title 50, Code of Federal Regulations, Section 11.25, an excerpt of which is attached.

§ 11.25 Appeal.

(a) Either the respondent or the Director may seek an appeal from the decision of an administrative law judge rendered subsequent to January 1, 1974, by filing of a "Notice of Request for Appeal" with the Director, Office of Hearings and Appeals, United States Department of the Interior, 4015 Wilson Boulevard, Arlington, Virginia 22203, within 30 calendar days of the date of the administrative law judge's decision. Such notice shall be accompanied by proof of service on the administrative law judge and the opposing party.

(b) Upon receipt of such a request, the Director, Office of Hearings and Appeals, shall appoint an ad hoc appeals board to determine whether an appeal should be granted, and to hear and decide an appeal. To the extent they are not inconsistent herewith, the provisions of Subpart G of the Department Hearings and Appeals Procedures in 43 CFR Part 4 shall apply to appeal proceedings under this Subpart. The determination of the board to grant or deny an appeal, as well as its decision on the merits of an appeal, shall be in writing and become effective as the final administrative determination of the Secretary in the proceeding on the date it is rendered, unless otherwise specified therein.

UNITED STATES
DEPARTMENT OF THE INTERIOR

OFFICE OF HEARINGS AND APPEALS

Hearings Division
6432 Federal Building
Salt Lake City, Utah 84138-1194
(Phone: 801-524-5344)

April 3, 1985

U.S. FISH & WILDLIFE SERVICE	: Docket No. DENVER 84-1
Complainant	: Civil Penalty Proceeding
v.	: Endangered Species Act of 1973, 87 Stat.0884,
RICHARD PAUL CHRISTY,	: 16 U.S.C. §§ 1538-1540
Respondent	: INV 8-23014

ERRATUM

The top line on page 11 of the captioned decision which issued March 14, 1985, was omitted. The corrected page 11 is attached hereto.

Harvey C. Sweitzer
Administrative Law Judge

Attachment

feel justified in taking a threatened species in contravention of the Endangered Species Act, and without complying with appropriate regulations promulgated thereunder, if their property is being endangered or destroyed. Proven violations of the Endangered Species Act must receive substantial sanctions in order to implement the dictates of the Act. Not-

United States Constitution Provisions

Amendment V, Due Process of Law

* * * nor be deprived of life, liberty, or property, without due process of law; * * *

Amendment V, Just Compensation for Property

* * * nor shall private property be taken for public use, without just compensation.

§1531. Congressional findings and declaration of purposes and policy

* * *

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

§1532. Definitions

* * *

(6) The term "endangered species" means any species which is in danger of extinction throughout all or a significant portion of its range other than a species of the Class Insecta determined by the Secretary to constitute a pest whose protection under the provisions of this chapter would present an overwhelming and overriding risk to man.

(19) The term "take" means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.

(20) The term "threatened species" means any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range.

§1533. Determination of endangered species and threatened species

(a) Generally

(1) The secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

§1533. Determination of endangered species and threatened species

* * *

(d) Protective regulations

Whenever any species is listed as a threatened species pursuant to subsection (c) of this section, the Secretary shall issue such regulations as he deems necessary and advisable to provide for the conservation of such species. The Secretary may by regulation prohibit with respect to any threatened species any act prohibited under section 1538(a)(1) of this title, in the case of fish or wildlife, or section 1538(a)(2) of this title, in the case of plants, with respect to endangered species....

§1538. Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g)(2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to —

* * *

(B) take any such species within the United States or the territorial sea of the United States; ...

50 C.F.R. §17.40 Special rules--mammals.

(b) *Grizzly bear (Ursus arctos horribilis)--(1) Prohibitions.* The following prohibitions apply to the grizzly bear:

(i) *Taking.*

(A) Except as provided in paragraphs (b)(1)(i) (B) through (F), of this section no person shall take any grizzly bear in the 48 conterminous states of the United States.

(B) Grizzly bears may be taken in self- defense, or in defense of others, but any such taking shall be reported in writing to the United States Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 19183, Washington, D.C. 20036, and to appropriate State officials, within 5 days after it occurs.

(C) *Removal of nuisance bears.* A grizzly bear constituting a demonstrable but non-immediate threat to human safety, or committing significant depredations to lawfully present livestock, may be taken, but only if:

(1) it has not been reasonably possible to eliminate such threat or depredation by live-capturing and releasing unharmed in a remote area the grizzly bear involved; and

(2) the taking is done in a humane manner by authorized Federal or State employees; and

(3) the taking is reported in writing to the United States Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 19183, Washington, D.C. 20036, and to appropriate State officials, within 5 days after it occurs.

(D) *Federal or state scientific or research activities.* Authorized Federal or State employees may pursue, capture, or collect grizzly bears for scientific or research purposes.

(E) *Northwestern Montana.* If it is not contrary to the laws and regulations of the State of Montana, a person may hunt grizzly bears in the Flathead National Forest, the Bob Marshall Wilderness Area, and the Mission Mountains Primitive Area of Montana: *Provided,* That if in any year in question 25 grizzly bears have already been killed for whatever reason in that part of Montana, including the Flathead National Forest, the Bob Marshall Wilderness Area and the Mission Mountains Wilderness Area, which is bounded on the north by United States-Canadian Border, on the east by U.S. Highway 91, on the south by U.S. Highway 12, and on the west by Montana-Idaho State line, the Director shall post and publish a notice prohibiting such hunting, and any such hunting for the remainder of that year shall be unlawful: *Provided further,* That any taking of a grizzly bear, for whatever reason, in the above-described portion of Montana shall be reported in writing to the United States Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 19183, Washington, D.C. 20036, and to the Montana Department of Fish and Game, within 5 days after the taking occurs; and except that any taking on an Indian reservation within the above-described area shall be so reported only to the United States Fish and Wildlife Service, Division of Law Enforcement, P.O. Box 19183, Washington, D.C. 20036.

(F) *National Parks.* The regulations of the National Park Service shall govern all taking of grizzly bears in National Parks.

Boyd, *Grizzlies & Sheep & People,*
IDAHO WOOL GROWERS BULLETIN,
September 1984

* * *

A wool grower that's been in the news the past year in regards to grizzly-sheep conflict is Bill Enget of St. Anthony. Bill owns a ranch near the east end of Henry's Lake Flat, just over the Continental Divide from Yellowstone National Park. His family has grazed sheep in the area since 1924. During the summer of 1983, a prominent but now deceased grizzly, No. 38, and her two cubs took a liking to Bill's unadvertised hospitality. as well as his sheep. They moved in to the Two Top Area of Bill's range. The Two Top Area is classified Situation I, which means all management of the area is worked around the grizzly. This area borders Bill's privately owned ground, which is classified Situation III. This means if a grizzly shows up, the grizzly has to be moved.

* * *

When grizzly No. 38 first showed up in the Two Top Area, Bill contacted the proper authorities and the bureaucrats moved in. Over a year later, which is right now, Bill Enget has lost his range "temporarily" and 'ol No. 38 is dead, subdued not by an angry rancher, but by a sedative overdose administered by representatives of the Interagency Grizzly Bear Committee....

As mentioned above, the Enget family was the recipient of another visit by a grizzly in the early morning hours of August 29. Unfortunately, there wasn't time for visiting with authorities in regards to steps to be taken. The bear crawled right back into Bill's buck herd, less than 300 yards from his house. When the dust settled, a wounded grizzly was on the run.

* * *

...All governmental, environmental, and citizen groups involved simply have to face reality. They can have grizzlies eating these unnaturally placed carcasses in peace and quiet or they can have grizzlies eating out of dumpsters in West Yellowstone, raiding campgrounds, or eating sheep. All of these will only lead to more dead grizzlies, sheep and people. Since 1970, a total of 193 dead grizzlies have been documented.

* * *

Residents Learn the Grizzly is Not an Easy Neighbor,
High Country News,
Jan. 4, 1988, at 12, col. 1

* * *

Montview, Idaho, sheep rancher Sam Davis also says he can live with the grizzly, but not under the current arrangement.

Davis' family has herded sheep on the same allotments on the west slope of the Tetons for more than 100 years. He and his brother Jim are among the last sheep ranchers with flocks grazing in Situation One Habitat under grizzly bear guidelines for the Greater Yellowstone Ecosystem. Situation One means that when a grizzly bear starts eating their sheep, they, not the bear, have to move.

"My business can't survive if it means moving out of the bear's way," Davis said. "We've been on these ranges for more than 100 years and dealing with the same grizzly bears. We've never killed them off and they've never driven us off."

* * *

Davis, whose business pumps about $250,000 annually into the Idaho economy, had little problem with grizzlies before the bear was placed on the threatened species list in 1975. He was spared the problems of his neighbors when Targhee officials installed grizzly rules early in the '80s.

But this year, in July and August, Davis faced his first confrontation with a grizzly bear since the Forest Service installed its sheep-monitoring system. For the Targhee National Forest, the survival of that particular bear spelled success.

But for Davis, it added costs that cut his business' slim margin. It also fueled uncertainty over whether he could continue to graze the area that his herders, sheep and family know so well. "It's already cost me $20,000 or more," said Davis.

"It could cost me the whole operation, all for one bear."

The incident started in July when herders reported a bear was killing some of Davis' sheep on the Bitch Creek ridge in Wyoming, northeast of Tetonia, Idaho. The area had a history of black bear predation, so government trappers came in and set snares.

A black bear was caught and killed, but the signs pointed to more than one bear. On July 16, a grizzly sow was found in the trap with two cubs near by. Wyoming Game and Fish officers tranquilized the bear and released it.

Davis sheep were allowed to stay, but a week later the grizzly struck again. Moving the sheep at that time would mean a loss of 10 to 15 pounds of weight gain in his lambs just prior to shipping. Sam Davis contacted a U.S. Department of Agriculture official, who contacted Regional Forester Stan Tixier, chairman of the Interagency Grizzly Bear Committee.

Tixier and the Forest Service held fast and Davis began moving the sheep out of the mountains. The grizzly followed and took more sheep before it left.

* * *

The number of sheep grazing in Situation One Habitat on the Targhee National Forest has dropped from 30,000 adults and lambs in 1975 to 2,120 in 1986, said Burns.

In the 1970s, the area around Davis' allotment became a "black hole" for grizzlies; they entered but often never left. Official mortality figures show seven bears were killed by sheepherders in the area in 1978 and 1979. No legal action was taken. Targhee officials began sending monitors along with the sheepherders to ensure that they were not killing grizzlies.

Burns said livestock protection is important to self-esteem of most ranchers....

"You aren't very well-respected in your area if you don't take care of your animals," he said. "It's hard to stand by while your animals are being killed by a bear."

Once the monitor system was in place, only one major incident took place on the Targhee prior to this season. "We're not going to move unless they force us to do it," said Davis. "If they force us to do it then we're broke."

Davis is pinning his hopes on changes in regulations once the bear is no longer listed as a threatened species. But that is not expected to happen soon, if ever, said Tixier.

* * *

There are many vacant sheep allotments outside of Situation One Habitat that could be used by Davis, said Tixier. But Davis said the cost of moving his operation and the adaptation of people and sheep to new range would make moving impossible.

* * *

Robbins, *A Town Divided by the Grizzly*,
New York Times Magazine,
August 31, 1986, Section 6

In the spring, two young grizzly bears, just out of a winter's sleep, wandered down out of the timbered high country of the Rocky Mountains and onto the prairie near Choteau, a small ranching community in central Montana....

Choteau, population less than 2,000 is a textbook illustration of the volatile mixture of biology and politics. The effort to protect certain animal species, with the powerful Federal Endangered Species Act (E.S.A.) as a tool, has generated no end of controversy....

At issue in Choteau is not only the fate of the grizzly, but a conflict between Federal policy and the rights of the individual....

* * *

Bert [Guthrie] blames the conflict between bears and people on the law's strict limitations against killing bears. Marauding bears that do not directly threaten a human life may only be tranquilized and moved. "The grizzly people are in control," Bert says.

* * *

At the center of the debate in Choteau is the E.S.A. Passed by Congress in 1973 to assure protection for animals threatened with extinction, the act prohibits the "taking"–directly or indirectly causing the death–of a species considered imperiled. Grizzlies were declared "threatened" in 1975.

Of all threatened American species, grizzlies are the most fierce...Although no one in Choteau has been involved, the fear is pervasive.

* * *

Physical danger is not the only issue. Economics is involved. In 1984, bears got into Bert's flock and killed five sheep. The only legal recourse was to call a state wildlife official, who traps and relocates the animals--a process Bert says is cumbersome and ineffectual. Montana officials did snare and relocate two orphan grizzlies, which may or may not have been responsible for killing Bert's sheep. Then, one night in 1985, claims Bert, grizzlies killed another 30 sheep, which he values at about $50 each. "It's crazy," says Bert. "We're in the business of raising sheep for human consumption, not bear consumption."

* * *

"Government involvement in the lives of individuals has been the cause of this," says Bert Guthrie. "It's a human-rights issue--the right of an individual to protect his property."....

* * *

Robbins, *Grizzly and Man When Species Collide,*
National Wildlife,
Feb/Mar 1988, p.21

* * *

...few would argue that the aptly named Ursus arctos horribilis is a formidable animal, the most dangerous of the more than 400 species protected under the U.S. Endangered Species Act. It has the strength to kill a man with a halfhearted blow. Perhaps even more threatening, it is largely beyond human control, a creature that must be met on its own terms. As one bear expert recently said, the phrase "grizzly bear management" is a "contradiction in terms, like military intelligence."...

* * *

The grizzly bear is a powerful symbol—so powerful sometimes that it seems to defy logic—of two very conflicting things. To some the massive creature is nature at its worst, a predator that indiscriminately kills people and livestock, threatening the existence--and very lives--of ranchers and farmers. Protection for the grizzly, says Ira Perkins, a rancher in Bynum, Montana, is sheer folly, a scheme fomented by easterners who have no clue about what it is like to cope with such a predator in their own backyard. "Our view is realism, theirs is idealism," says Perkins. "If they were here where the bear could take a bite out of them, they'd be just like us."

* * *

Today grizzlies are found in two primary enclaves in the Lower 48--around the Continental Divide in northern Montana, with Glacier National Park at its core; and in the area containing Yellowstone Park. Between 400 and 800 bears--the only population that Montana officials want to delist--are estimated to inhabit Glacier Country. More than 200 grizzlies are believed to inhabit the Yellowstone region. In Canada and Alaska, meanwhile, there are thousands of grizzly bears.

• • •

...more and more people have been moving closer to the bears' mountain retreats. And more grizzlies are venturing down to the plains. The result: conflicts between the two species--and renewed calls to control the grizzly population. And ranchers are occasionally taking matters into their own hands.

• • •

Turbak, *Grizzly on the Ropes*,
American Forest,
Feb. 1984, Vol. 90 N2 pp. 22-23

• • •

Today there are six populations of grizzlies in the lower 48 states ... 1) the northern Cascade Mountains in Washington, 2) the Selway-Bitterroot Wilderness along the Idaho-Montana border, 3) the Selkirk Mountains on the Idaho-Washington border, and 4) the Cabinet Mountains in northwest Montana....

The second largest population of grizzlies dwells in the wild area in and around Yellowstone National Park....

The largest grizzly population...lives in northern Montana's Glacier National Park and the adjacent Bob Marshall, Great Bear, Mission Mountain, and Scapegoat Wilderness areas.

• • •

Adding to the Cabinet grizzly's woes is the fact that the 94,000-acre wilderness may contain significant amounts of copper and silver. For the past four years, the American Smelting and Refining Company has been drilling for minerals within the wilderness. U.S. Borax began its own drilling project there last year.

The Cabinet Wilderness grizzly dilemma is a bureaucrat's nightmare. On one hand, the Wilderness Act of 1964 and the Mining Law of 1872 support the search for minerals. But the grizzly's threatened status gives the big bear protection under other federal law....

• • •

Public-land custodians frequently find themselves in the dilemma of having to manage forests simultaneously for recreation, timber production, mining, and grazing, as well as for grizzlies and other wildlife.

No Right to Shoot Marauding Grizzly Bears, Ranchers Told,
Los Angeles Times,
Sept. 22, 1988, at 1, col. 3

Ranchers whose livestock are threatened by grizzly bears have no constitutional right to shoot an endangered species, even when federal law permits limited sport hunting of the bears, a federal appeals court ruled Wednesday.

Ruling in the case of a Montana rancher who lost 84 sheep in a single month to marauding grizzlies, the U.S. 9th Circuit Court of Appeals held that there is no constitutional right to defend property against wildlife protected under federal law.

Rancher Richard P. Christy was fined $2,500 when he shot and killed a grizzly bear, one of several that had already slaughtered 20 of his sheep grazing on lands leased from the Blackfoot Indian Tribe near Glacier National Park.

Previous attempts to frighten the bears by building fires and firing shots into the air had failed, as had attempts by the U.S. Fish and Wildlife Service to set traps.

Christy challenged the fine, asserting that the penalty violated his constitutional right to defend his sheep. He later sought to have the federal regulations protecting the grizzlies declared unconstitutional because he said they irrationally permit limited sport hunting of the bears while preventing ranchers from protecting their livestock.

But in a unanimous decision written by Judge Arthur L. Alarcon, the court upheld the regulations and held that while ranchers can kill an endangered species to protect their lives, there is no such protection for defense of property.

"We do not minimize the seriousness of the problem faced by livestock owners such as plaintiffs, nor do we suggest that defense of property is an unimportant value," the court said.

"We simply hold that the right to kill federally protected wildlife in defense of property is not 'implicit in the concept of ordered liberty' nor so 'deeply rooted in this nation's history and tradition' that it can be recognized by us as a fundamental right guaranteed by the Fifth Amendment."

* * *

Opinion: Grizzly Kill Means Congress Needs to Bear Down and Work,
The Herald (Provo, Utah),
November 14, 1988 at 5

... [Christy] didn't expect, however, that the bears would devour 84 of his sheep in just the first two months.

So, with a startled U.S. Fish and Wildlife Service agent standing nearby, Christy shot one. But because the grizzly is an endangered species, the 9th U.S. Circuit Court of Appeals ruled the other day that Christy should not have killed the bear no matter how grave the provocation.

The decision denies the historic right of the shepherd to protect his flock from a predator that happens to be under government protection, and it has stirred intense controversy among Western ranchers and wildlife advocates.

Environmentalists argue that to be effective the federal government has to prohibit killing endangered species except where a human life is endangered.

Christy's attorneys, however, point out that enforcing that prohibition against stockmen doesn't make sense since the feds already allow grizzlies to be hunted for sport, endangered or not. More important, those kinds of conflicts and contradictions are only going to increase as the government presses ahead with its efforts not just to expand the population of indigenous predators but also to reintroduce some others that haven't been seen in the Western states for generations.

In the realm of sheer absurdity, Christy's bear is easily outstripped by the current federal rules regulating relations with the wolves that Fish and Wildlife officials are trying to re-establish in the Yellowstone area. Currently a rancher can shoot a wolf outside the park if it came to the United States on its own but not if it's one of the wolves the government brought here from Canada. That distinction isn't likely to make

any difference to the wolf that's being fired on. And, of course, it's of no practical use either to the hunter who encounters a wolf in the forest and is apparently expected to ask the beast whether he walked in or came by bus.

There are alternatives. Some experts have proposed that wildlife programs should provide limited compensation for any losses they may cause to farmers and livestock owners. That's how its done here in Utah, and Colorado and Wyoming have similar assistance programs for damage done by certain predators. Other states, like California, pay to feed birds and waterfowl that might otherwise be tempted to dine on valuable crops.

* * *

Brown, *Return of the Natives,*
Wilderness Magazine,
Winter 1988, p. 40

... Now, operating on the assumption that true wilderness must include healthy populations of endemic wildlife--including the great predators that once occupied the top of a food chain that did not include civilized man--many people in and out of government are pushing to broaden the effort, a movement not without problems but one with enormous potential for enlarging and enriching the wilderness experience.

* * *

With a growing national interest in "nongame" wildlife and the passage of the Endangered Species Act in 1973, animals other than game species are also beginning to be reintroduced....

* * *

Even if every game animal and all of our endangered birds should be restored to levels rivaling their original abundance, our wildlife heritage will be incomplete. No government or individual has yet to replace a lost population of cougars, gray wolves, or grizzlies. Until such time as these big carnivores are returned to at least some representative areas within the ranges they formerly occupied, many people believe, the job begun by Dr. Looney and his generation will remain undone.

The reasons for the omission are political more than biological. Bureaucracies have found the proposed reintroduction of a potentially troublesome species even more controversial and difficult than the protection of an endangered one. Hence, no agency administrator wants to take on the opprobrium of introducing a predator that is sure to incite the wrath of stockmen and even some "old-time" sportsmen--even though few people of other persuasions now question the value of cougars, wolves and grizzlies to the natural world.

* * *

No animal has come to symbolize more the difference between what wilderness should be and what it is has become than the gray wolf. And no other animal, not even the grizzly, is more despised by stockmen. For decades the wolf was incessantly hunted down and eliminated everywhere it could be found....

* * *

When all remaining subspecies of the gray wolf in the coterminous United States were declared "endangered" in 1967, their management was entrusted to the Fish and Wildlife Service, the same agency that had worked so hard to eliminate them....The responsibility for any reintroductions, however, was left to the states, which did little or nothing to evaluate potential reintroduction sites and elicit public support for such a program. Strongly influenced by the livestock industry, most Western state officials expressed outright hostility to any reintroduction efforts;...

* * *

After years of debate and several revisions, a Northern Rocky Mountain Wolf Recovery Plan finally was approved in August 1987. The plan called for restoring three separate populations of ten or more breeding pairs or packs (the terms are almost synonymous) in central Idaho, in the Glacier National Park-Bob Marshall Wilderness area of Montana, and in the Greater Yellowstone Ecosystem. Because state officials oppose a reintroduction of wolves to central Idaho, where they believe as many as fifteen wolves may already be present, and because wolves may naturally become reestablished in and around Glacier National Park, most of the attention has focused on reintroducing wolves to Yellowstone National Park. Although Yellowstone itself is closed to grazing and its 25,000 elk and unhunted bison and mule deer literally need wolves for population control, the prospect of wolves spreading outside the park infuriates livestock operators. Under pressure from Rocky Mountain legislators, the Director of the Fish and

Wildlife Service, Frank Dunkle, a former Montana legislator himself, went back on his approval to reintroduce wolves to Yellowstone.

Nonetheless, an increasing number of people want wolves and support for introduction appears to be growing....

* * *

Times cannot change soon enough for the grizzly bear. If the howl of a wolf is the call of the wild, the presence of a grizzly is the ultimate wilderness experience for humans....By World War II the grizzly had disappeared from all of his former strongholds in California, Arizona, New Mexico, Utah, and Oregon. Fifty years later and the grizzly is gone from Mexico and Colorado. Despite its retreating distribution and decades of wrangling over how many grizzlies remain, no state plans to reintroduce a grizzly....

This sentiment against grizzlies results not so much from fear of human safety, but, again, from the opposition of ranchmen. Having gotten rid of the grizzly, the stockmen still fear its ghost. They know that the time of unregulated control has come and gone, and that should grizzlies be reintroduced, the bears would now be valued more as treasures than condemned as nuisances. Such a prospect would "interfere" with their ranching operations on public lands, and accommodating an endangered species would cause them to have to change their ways of doing business. As for wildlife agency heads, reintroducing grizzlies translates only into problems and expense.

* * *

Is the absence of a full complement of native wildlife--including large predators--a necessary price of civilization? In the spring of 1987 I went to Italy to see how a nation not much larger than California, populated by 55 million people and settled for upwards of 3,000 years, could still boast populations of both wolves and bears....

* * *

...Italian farmers are more tolerant, it appears, than American stockmen, and the park...has been zoned in an attempt to accommodate the needs of both man and bears. I was shown how sheep are folded at night and guarded by shepherds and dogs....livestock losses from bears are unusual and sporadic. Depredation complaints are generally confined to bears getting into cornfields,.... Such claims when validated are compensated by the government.

* * *

Are most of America's wildlands destined to remain forever depauperate, without the very symbols of their wilderness? If so, it is not because of biological limitation. Suitable stock for restoration exists, numerous innovative capture and release techniques have been proposed and tested, and the world's greatest wilderness system assures a wide selection of potential release sites. What is needed is the will and intelligence to make the restoration of our big predators politically possible.

Pennisi, *Wolves,*
United Press International, Inc.
Wire Service, April 30, 1988

* * *

...efforts to bring wolves back in North Carolina, the Southwest and the Northern Rockies have mixed results and have sparked criticism from pro-wolf and anti-wolf factions.

While environmentalists and conservationists want to reestablish wolves in the wild, ranchers and farmers are concerned about the wolves' appetite for cattle and sheep. Because wolves are a protected species, ranchers are prohibited from trying to shoot or otherwise dispatch them to their maker.

* * *

Courage in the federal government is probably not be the issue for Joe Helle, a sheep rancher in Dillon, Mont., who said simply: "I fear for my livestock."

* * *

...others have surveyed public opinion and attitudes about wolves. Kellert's poll of Minnesotans showed that most people value the wolf's existence, even though many are not really willing to limit human activity to protect wolf habitats. Urban dwellers tended to be most supportive of wolves.

* * *

Of the three U.S. Fish and Wildlife Service plans for wolf recovery one for each type of wolf the one for the red wolf is the furtherest along.

* * *

The gray wolf has not been as well received, at least not so far. Recovery plans for both the Mexican gray wolf and the Northern gray wolf have hit snags.

* * *

The U.S. Fish and Wildlife recovery plan for the Mexican gray wolf has provided for breeding the wolf in captivity and for possible release in New Mexico, Texas or Arizona. But at this point, no state is willing to host wolves in the wild. (Emphasis added.)

The most likely site had been in New Mexico. But in March, for the second time, the commanding general of the White Sands Missile Range refused to allow the base, which had been a tentative site, to [be] considered as a wolf refuge. Texas has passed a law prohibiting the wolf's reintroduction within its borders.

Arizona Fish and Game officials haven't ruled out the possibility of reintroducing wolves, but they are not actively considering a site. The agency first wants to survey its residents about their knowledge and attitudes toward wolves.

"The whole thing is a very delicate issue in the Southwest, particularly in Arizona," said Barry Spicer, non-game biologist for the Arizona Game and Fish. Ranchers fear the wolves would kill livestock....

* * *

In 1980, a team that included state, federal and university wildlife managers; members of conservation groups; and ranchers began designing a recovery plan for these wolves.

* * *

For reintroduction of wolves, the plan sets up three areas, one in Greater Yellowstone, one that includes in the Bob Marshall Wilderness Area in Montana, and one in central Idaho.

* * *

Reintroduction into the other areas is a little more complicated, however. The recovery plan for the Northern Rockies, which includes Montana, northern Idaho and Yellowstone National Park, contains compensation for ranchers should their livestock be killed by wolves, but many ranchers are still leery, said Peek. The plan has not yet been enacted.

Said rancher Helle: "We feel very threatened by it. For wolf advocates to think they could just bring the wolf back to its original status in the lower 48 states is ludicrous."

"The nation should not have to feed wolves domestic livestock and that's what would happen."

* * *

In Idaho, there was such a uproar over [the] plan, however, a proposal was introduced in the legislature to reclassify wolves as predators. The motion was defeated. Montana has refused to support the plan on the basis that it would be too expensive and inflexible.

Some of these concerns are well-founded, said Peek. When two cows were killed by six wolves that crossed over from Canada, farmers had to call for help from the federal government because they could not try to nab the wolves themselves. Federal authorities ended up killing three of the wolves and trapping two pups and sending them to zoos. The sixth wolf eluded capture. The whole effort cost $90,000.

* * *

Hunters, too, are concerned about the wolves. Peek evaluated the effects that these wolves, once they established packs totaling 100 individuals, would have on the 4,600 elk in the Bob Marshall site. Hunters kill about 580 elk there each year.

Peek used data from other studies to estimate the yearly dietary needs of the wolves. On the average a wolf kills a moose or elk once every 52 days and a deer once every 23 days. In the Bob Marshall area, they will eat a mix of both. If the wolves thrive, then hunters will have to stop hunting female elk and would have to cut their catch by a half to keep the elk herd stable, said Peek. "It will have a major effect on the hunters," he said.

* * *

Vesey, *Wolves,*
United Press International, Inc. Wire Service
December 13, 1987

* * *

One...plan is to place the Rocky Mountain timber wolf, a subspecies of the gray wolf, in Yellowstone National Park, where they have not lived for more than 50 years.

The Wyoming congressional delegation opposes the idea.

"I don't have any problems with wolves in Yellowstone," said Rep. Richard Cheney, R-Wyo. "The problem is wolves getting out of the park and the inability of the federal government to control predators."

Differences over wolf recovery have led to a political battle that persists on Capitol Hill and within the Reagan administration.

When he became director of the park service in 1985, William Penn Mott, Jr. announced he favored a wolf recovery program.

The U.S. Fish and Wildlife Service came up with a plan, mandated by the Endangered Species Act, to re-establish wolves in northern Montana, central Idaho and Yellowstone. The plan would result in 10 breeding pairs of wolves in each locale.

Cheney and Wyoming's Republican senators, Alan Simpson and Malcom Wallop, campaigned against the plan. They lobbied Mott's bosses, Fish and Wildlife Service Director Frank Dunkle and Interior Secretary Donald Hodel, both of whom opposed the recovery plan.

In August, Mott was forced to put the wolf program on hold indefinitely, but he made it clear he would continue to speak out in support of the plan.

In September, Owens determined to see the wolf plan carried out introduced legislation that orders the National Park Service to reintroduce wolves to Yellowstone within three years.

That did not please ranchers in the Yellowstone region. Afraid that wolves would kill their livestock, the ranchers are determined to defeat the wolf recovery program.

* * *

The Rocky Mountain gray wolf is one of the largest of the wolf family. Males measure up to 32 inches at the shoulder and can top 100 pounds.

It eats from 5 to 10 pounds of meat a day,....

* * *

Robbins, *Wolves Across the Border,*
Natural History,
5/86, p. 6

The reappearance of an endangered predator in Glacier National Park may be greeted with howls of protest

After thirteen puzzling years of trying to answer one question about wolves, biologist Robert Ream's luck has changed. He now has one answer and, in typical scientific fashion, a whole list of new questions.

• • •

The question was answered unexpectedly last November when a pack of twelve wolves--named the Magic Pack--moved south from Alberta to Glacier National Park. It was the first pack to take up residence in the western United States since the 1930s (some 1,200 wolves inhabit parts of Minnesota, northern Wisconsin, and Michigan).

• • •

The wolf's reappearance has also begun to fan back to life the long-dead embers of human controversy. The economies of Montana and Idaho are based largely on agricultural and resource industries. The presence of the wolf could throw an unexpected wrench into the currently troubled, sputtering operation of these industries. To make matters worse, the wolf appears on the scene in the midst of a vitriolic debate between ranchers and state governments over management of another predator--the grizzly bear.

Compounding the problem, according to U.S. Fish and Wildlife Service wolf recovery team members, is a flaw in the Endangered Species Act. Under the act, no wolf--even individuals that kill livestock--can be killed. This has led the director of Montana's Department of Fish, Wildlife and Parks to bow his agency completely out of wolf recovery until the control problem is solved.

• • •

Deprived of the bison, the wolf turned to the plentiful and vulnerable cattle and sheep. A bounty was placed on the head of the wolf, and between 1883 and 1918 more than 80,000 wolves were killed in Montana alone--either poisoned, shot, or dynamited in their dens. The wolf was pursued with a vengeance, and even though its numbers had been greatly reduced by the century's turn, ranchers were not appeased.

• • •

The migration of wolves into Glacier National Park is considered a natural recovery. In recent years a great deal of attention has been focused on the proposed reintroduction of the wolf into Yellowstone National Park--a prime location for wolves because it covers almost 3,500 square miles and has an extremely large population of ungulates. However, the issue is a political tar baby for a number of reasons--first, reintroduction means trapping wolves where populations are healthy and importing them to the park. Second, the park is surrounded by sheep and cattle allotments on national forest land, and many of the ranchers there are already angry about existing problems with federally protected grizzly bears, which occasionally satisfy a craving for livestock. In Glacier National Park there is only one large cattle operation, on the west side of the park, which makes the recovery there more palatable to cattlemen. The political problems with the wolf around Yellowstone are so great that Ream, who is on the U.S. Fish and Wildlife Service Northern Rocky Mountain Wolf Recovery Team, voted against recommending wolf reintroduction there.

• • •

Livestock operators are not thrilled about the return of an old nemesis, natural or otherwise. Even with a zone system, the industry expects problems. "They don't understand boundaries, they don't understand zones," said Stuart Doggett of the Montana Stockgrowers Association....

Livestock interests think the wolf should be downlisted from an endangered to a threatened species to allow for more flexible management. "If the wolf was not on the endangered species list, I think we could protect ourselves," said Mons Teigen, director of the Montana Stockgrowers Association, a group that was formed a century ago around the nucleus of perceived wolf predation. "[The wolf] being on the list, we have to defend ourselves with our hands tied behind our backs." Asked if he thinks wolf and livestock can coexist, Teigen shook his head and replied, "I doubt it." Teigen believes labyrinthine federal endangered species regulations may lead a few ranchers to control wolves with the three-S method. "Shoot, shovel, and shut up," he said. "Maybe that system has something to offer--I don't know."

As the law reads now, the Fish and Wildlife Service has the authority to trap livestock-killing wolves, but only to relocate them. Destruction is against the law. And moving the animals, says Bart O'Gara, leader of the recovery team, is next to impossible because no one will accept a livestock-killing wolf. Both he and Bob Ream think a change in the Endangered Species Act to allow a greater flexibility with endangered predators is vital to wolf recovery. "Managing an endangered predator is quite different from managing an endangered butterfly," O'Gara said. "If I was a rancher I'd be worried."

In Minnesota the problem was eased by downlisting the wolf from an endangered to a threatened species, a move that allows wolves to be destroyed....

* * *

No. 88-1461

In the Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD P. CHRISTY, ET AL., PETITIONERS

v.

MANUAL LUJAN, JR., SECRETARY OF THE INTERIOR AND UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, is unconstitutional as applied to petitioners, who sought to kill grizzly bears that were attacking petitioners' livestock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In the Supreme Court of the United States

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 6a-32a) is reported at 857 F.2d 1324. The memorandum and order of the district court (Pet. App. 2a-5a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 1988. A petition for rehearing was denied on November 3, 1988 (Pet. App. 33a). On December 1, 1988, Justice O'Connor extended the time for filing a petition for a writ of certiorari to and including March 3, 1989. The petition was filed on March 1, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Endangered Species Act (the Act), 16 U.S.C. 1531 *et seq.*, "to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved" and "to provide a program for the conservation of such endangered species and threatened species" (16 U.S.C. 1531(b)). "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost." *TVA* v. *Hill*, 437 U.S. 153, 184 (1978). As the Court explained in *Hill*, "the language, history, and structure of the legislation * * * indicate[] beyond doubt that Congress intended endangered species to be afforded the highest of priorities" (*id.* at 174).

The Act authorizes the Secretary to designate particular species as "endangered" or "threatened" and to take measures to protect them. An "endangered" species is defined in pertinent part as "any species which is in danger of extinction" (16 U.S.C. 1532(6)), while a "threatened" species is defined in pertinent part as "any species which is likely to become an endangered species within the foreseeable future" (16 U.S.C. 1532(20)). The Act prohibits persons from "tak[ing]" any "endangered" species (16 U.S.C. 1538(a)(1)), where "take" means "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct" (16 U.S.C. 1532(19)). The Act also authorizes the Secretary to issue "regulations as he deems necessary and advisable to provide for the conservation of [threatened] species," which may include regulations that flatly prohibit the taking of a threatened species (16 U.S.C. 1533(d)).

The grizzly bear (Ursus arctos horribilis) is listed as a threatened species throughout the lower 48 states (50 C.F.R. 17.11(h)), and since 1976 it has been the subject of

protective regulations (50 C.F.R. 17.40(b)). Those regulations generally prohibit the taking of grizzly bears, 50 C.F.R. 17.40(b)(1)(i)(A), with a few, limited exceptions. See Section 17.40(b)(1)(i)(B), (C), and (D). One of those exceptions, contained in Section 17.40(b)(1)(i)(C), describes the only circumstances under which grizzly bears preying on livestock may be taken. It provides in pertinent part:

> *Removal of nuisance bears.* A grizzly bear constituting a demonstrable but non [*sic*] immediate threat to human safety, or committing significant depredations to lawfully present livestock, crops, or beehives may be taken, but only if:
>
> (*1*) It has not been reasonably possible to eliminate such threat or depredation by live-capturing and releasing unharmed in a remote area the grizzly bear involved; and
>
> (*2*) The taking is done in a humane manner by authorized Federal, State, or Tribal authorities, and in accordance with current interagency guidelines covering the taking of such nuisance bears * * *.

2. Petitioner Christy owned about 1700 head of sheep. On or about June 1, 1982, he began grazing the sheep on land he had leased from the Blackfeet Indian Tribe, located adjacent to Glacier National Park in Montana, which is a known habitat for grizzly bears. Beginning about July 1, grizzly bears began attacking the herd. After attempting, without success, to frighten the bears away from the herd, petitioner sought assistance from Kenneth Wheeler, an employee of the United States Fish and Wildlife Service, who tried to trap the bears. Pet. App. 10a; Gov't C.A. Br. 20.

By July 9, bears had killed about 20 sheep, worth at least $1200. That evening, while petitioner Christy and Wheeler were standing together on the leased property, two grizzlies emerged from the forest. Christy picked up a rifle and shot and killed one of them. Pet. App. 10a.

On July 22, the Tribe agreed to terminate Christy's lease and to refund his money. Christy thereafter removed his sheep from the leased land, having lost a total of 84 sheep to the bears. Christy stated that he was thereafter forced to sell the remainder of his flock at slaughter value, absorbing a loss in excess of $10,000. Pet. App. 3a, 10a-11a.

As a consequence of Christy's killing of the grizzly in violation of the Act and regulations, the Department of the Interior assessed a civil penalty against him of $3,000. Christy thereafter filed an application for a hearing, seeking relief from the penalty. At the hearing, Christy admitted that he had killed a bear knowing it to be a grizzly, but he contended that he did so in the exercise of his right to defend his sheep. The administrative law judge sustained the imposition of the penalty but reduced it to $2,500. Pet. App. 11a.

3. On January 30, 1986, Christy, joined by two other sheepherders, petitioners Guthrie and Perkins, filed the present action in the United States District Court for the District of Montana. In an unpublished memorandum and order, the district court granted summary judgment against petitioners (Pet. App. 2a-5a). The court first rejected the contention that there is a "fundamental right to possess and protect property" (*id.* at 3a). Applying, instead, the "rational basis" test, the court held that the Endangered Species Act is "rationally relate[d] to * * * the legitimate governmental concern of protecting threatened and endangered wildlife" (*id.* at 4a). The court next rejected the claim that the loss of petitioners' sheep constituted a taking of their property by the federal govern-

ment without just compensation, in violation of the Fifth Amendment (*ibid.*). The court also concluded that the Act constitutes a valid delegation of legislative authority and that the regulations "are a rational reflection of Congressional will, properly promulgated under the authority vested in the Secretary of the Interior" (*id.* 5a). Finally, the court sustained the penalty assessed against Christy, finding that it was supported by substantial evidence in the administrative record (*ibid.*).

4. The court of appeals affirmed (Pet. App. 6a-32a). The court first "decline[d] [petitioners'] invitation to construe the fifth amendment as guaranteeing the right to kill federally protected wildlife in defense of property" (*id.* at 18a). Instead, the court inquired whether the Endangered Species Act "rationally further[s] a legitimate governmental objective" (*id.* at 19a). Applying that standard, the court rejected petitioners' due process claim, holding that the Act and the accompanying regulations "plainly advance" the legitimate interest in " 'halt[ing] and revers[ing] the trend towards species extinction, whatever the cost' " (*ibid.* (citation omitted)). For similar reasons, the court rejected petitioners' equal protection challenge to the Act (*id.* at 20a-25a). The court recognized (*id.* at 22a-23a) that the statute permits sportsmen a limited number of killings every year in certain parts of Montana. The court rejected, however, petitioners' "unsupported assumption that a program of carefully controlled killings of bears in limited geographic regions cannot promote 'conservation' and, therefore, necessarily conflicts with the purpose of the [Act]" (*id.* at 23a). Finally, relying on *Mountain States Legal Found.* v. *Hodel*, 799 F.2d 1423 (10th Cir. 1986), cert. denied, 480 U.S. 951 (1987), the court of appeals held (Pet. App. 26a-29a) that the statute and regulations do not constitute an unlawful taking under the Fifth Amendment. The court explained (*id.* at 28a) that "[t]he federal

government does not 'own' the wild animals it protects, nor does the government control the conduct of such animals." Accordingly, the court reasoned (*id.* at 29a), "[t]he losses sustained by [petitioners] are the incidental, and by no means inevitable, result of reasonable regulation in the public interest."[1]

ARGUMENT

1. Petitioners contend that the Endangered Species Act and the regulations promulgated thereunder infringe their "constitutional right to protect property" (Pet. 10) and, therefore, violate due process and equal protection. They acknowledge, however, that "[t]he existence of a constitutional right to protect property has never been decided by this Court" (*ibid.*), and that the Constitution does not expressly recognize any such fundamental right (*ibid.*). Moreover, petitioners do not contest the court of appeals' observation (Pet. App. 16a) that "[n]o court * * * has construed the United States Constitution to protect" the right asserted. For the reasons stated by the court of appeals, this Court should decline petitioners' invitation "to expand the substantive reach" of the Due Process Clause of the Fifth Amendment (*Bowers* v. *Hardwick*, 478 U.S. 186, 195 (1986)).

Under the appropriate standard, the statute and regulations plainly are rationally related to a legitimate governmental purpose. Petitioners themselves acknowledge the statute's "commendable goal[]" (Pet. 13) of preserving

[1] The court of appeals also rejected the claim that the statute constitutes an undue delegation of legislative authority (Pet. App. 29a-31a), as well as the claim that the Secretary exceeded the scope of his authority in promulgating certain of the regulations (*id.* at 31a-32a). The petition does not present those issues.

endangered and threatened species of wildlife. Petitioners contend (Pet. 15), however, that they have been denied equal protection, because the regulations permit sportsmen to kill as many as 25 grizzly bears each year, in certain designated parts of Montana. See 50 C.F.R. 17.40(b)(1)(i)(E) (1987). As the court of appeals explained, however, the exception contained in that regulation was based on evidence establishing that " 'grizzly bear population pressures definitely exist in the [designated areas]' " (Pet. App. 24a), and that seasonal sport hunting—as opposed to the isolated killings urged by petitioners—"would both relieve the population pressures and condition the bears 'to avoid all areas where humans are encountered' " (*id.* at 25a (citation omitted)).

2. Petitioners also contend in passing (Pet. 16-17) that the Endangered Species Act and the accompanying regulations effect an uncompensated taking, in violation of the Fifth Amendment. The court of appeals, following the analysis of the Tenth Circuit in *Mountain States Legal Found.* v. *Hodel, supra*, correctly held otherwise. As the court below explained (Pet. App. 28a), the government does not own or control grizzly bears, although it tries to minimize their contact with humans. Moreover, the statute does not entirely bar efforts by landowners to protect their property from depredations by grizzly bears; it simply proscribes the killing of grizzlies, with narrow exceptions. Indeed, even the killing of "nuisance bears" is permitted as a last resort, provided that such killings are conducted by authorized state, tribal, or federal officials. See 50 C.F.R. 17.40(b)(1)(i)(C). The Act and the regulations are therefore like a great many other federal and state laws, including traditional fishing and hunting laws, that incidentally affect property rights and that have been upheld in the face of similar challenges. See, *e.g.*, Bald and Golden Eagle Protection Act, 16 U.S.C. 668 *et seq.*;

Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*; Migratory Bird Treaty Act, 16 U.S.C. 703 *et seq.*; Wild Free-Roaming Horses and Burros Act, 16 U.S.C. 1331 *et seq.*; *Mountain States Legal Found.* v. *Hodel*, 799 F.2d 1423 (10th Cir. 1986), cert. denied, 480 U.S. 951 (1987); *Bishop* v. *United States*, 126 F. Supp. 449, 452-453 (Ct. Cl. 1954), cert. denied, 349 U.S. 955 (1955) (crops lost to geese protected by Migratory Bird Treaty Act); *Sickman* v. *United States*, 184 F.2d 616 (7th Cir. 1950), cert. denied, 341 U.S. 939 (1951) (same).[2]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APRIL 1989

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[2] What is more, the Endangered Species Act, as well as the regulations protecting grizzly bears in particular, had been in effect for several years before petitioner Christy began grazing sheep on land adjacent to Glacier National Park. Christy therefore has no basis for claiming a reasonable, investment-backed expectation of freedom from depredation by grizzly bears.

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No. 88-1461

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October Term, 1988

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Petitioners,

vs.

DONALD P. HODEL, Secretary of the Interior and THE UNITED STATES DEPARTMENT OF INTERIOR

Respondents.

PETITIONERS' REPLY MEMORANDUM

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May, 1989

On page 7 of their opposing brief, Respondents make the following assertion, impliedly in support of their position that no violation of the Fifth Amendment taking clause has occurred:

> Moreover, the statute [Endangered Species Act] does not entirely bar efforts by landowners to protect their property from depredations by grizzly bears; it simply proscribes the killing of grizzlies, with narrow exceptions.[1]

Respondents' inclusion of this statement shows a perception on their part that this issue may well be material to this or any Court's ruling on the taking question.

It is the position of Petitioners that the quoted statement is wholly erroneous as applied to the species *ursus arctos horribilis* and Respondents reliance thereon simply underscores the District Court's error in advancing to a ruling in this case without the benefit of discovery. It is commonly known that the grizzly bear is without equal in its strength and ferociousness.[2] These characteristics demonstrate the futility of any of the "...efforts to protect...property" alluded to at page 7 of Respondents' Brief. Thus, while the Act and regulations do not on their faces proscribe any and all means of protecting

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1. Similarly, the court of Appeals for the Ninth Circuit concluded in its opinion that the Act did not proscribe the defending of property by means other than killing. (Pet. App., p. 20a)

2. In the article *Grizzly and Man When Species Collide*, National Wildlife, Feb./Mar. 1988 quoted in Petitioners' Appendix at p. 69a, the grizzly is noted as

> ". . . most dangerous of the more than 400 species protected under the U.S. Endangered Species Act. It has the strength to kill a man with a half hearted blow. Perhaps even more threatening, it is largely beyond human control. A creature that must be met on its own terms. * * * "

stock from depredating grizzly bears, this, as a practical matter, is meaningless. Petitioners were, however, precluded by the District Court from establishing this by way of discovery.

The foregoing discussion re-emphasizes the need for this Court to review the Ninth Circuit's affirmation of the District Court's grant of summary judgment to the Respondents, when this as well as other important issues of fact previously referred to were unresolved. The Petition for Writ of Certiorari should be granted.

Respectfully submitted this 3rd day of May, 1989.

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88-1461

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Respondents.

AMICUS CURIAE BRIEF OF MONTANA STOCKGROWERS ASSOCIATION, MONTANA WOOL GROWERS ASSOCIATION, IDAHO WOOL GROWERS ASSOCIATION, WYOMING WOOL GROWERS ASSOCIATION, COLORADO CATTLEMENS' ASSOCIATION, NATIONAL CATTLEMENS' ASSOCIATION AND AMERICAN SHEEP INDUSTRY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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17pp

QUESTIONS PRESENTED FOR REVIEW

I. Is the protection of one's property from imminent destruction by federally protected wildlife encompassed among the rights guaranteed by the Constitution of the United States of America?

II. If such right is encompassed among those guaranteed by the Constitution, what is the appropriate level of review to be used in determining whether governmental proscription on its exercise meets Constitutional requirements?

III. If such right is encompassed among those guaranteed by the Constitution, can the complete proscription of its exercise as contained in the Endangered Species Act and regulations promulgated thereunder satisfy the appropriate level of review?

IV. Does the absolute prohibition of the right to protect one's property from imminent destruction contained the Endangered Species Act and regulations, and the subsequent failure to compensate for the losses sustained therefrom constitute a taking in violation of the Fifth Amendment to the Constitution of the United States?

V. Does the federal government's selection of a species of wildlife for protection and its proscription on the killing of such wildlife even in the immediate protection of one's property render such species an agent of the government for purposes of determining whether destruction of private property by such wildlife

constitutes governmental taking for Fifth Amendment purposes?

VI. Does governmental relocation of protected wildlife render such wildlife an agent of the government for purposes of determining whether any subsequent descruction of private property by such wildlife constitutes tovernmental taking for Fifth Amendment purposes?

VII. Did the Ninth Circuit err in upholding summary judgment based on the absence of any genuine issues of material fact when Petitioners had been precluded by order of the District Court from conducting any discovery to obtain such material facts?

LIST OF PARTIES

The parties named in the caption of this Petition are the same as those named in the proceedings below.

The amicus curiae are as follows:

MONTANA STOCKGROWERS ASSOCIATION
MONTANA WOOL GROWERS ASSOCIATION
IDAHO WOOL GROWERS ASSOCIATION
WYOMING WOOL GROWERS ASSOCIATION
COLORADO CATTLEMENS' ASSOCIATION
NATIONAL CATTLEMENS' ASSOCIATION
AMERICAN SHEEP INDUSTRY

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. _____

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1988

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Petitioners,

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AMICUS CURIAE BRIEF OF MONTANA STOCKGROWERS ASSOCIATION, MONTANA WOOL GROWERS ASSOCIATION, IDAHO WOOL GROWERS ASSOCIATION, WYOMING WOOL GROWERS ASSOCIATION, COLORADO CATTLEMENS' ASSOCIATION, NATIONAL CATTLEMENS' ASSOCIATION AND AMERICAN SHEEP INDUSTRY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The amicus curiae respectfully support the petition for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on September 21, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 857 F.2d 1324 and is reprinted in the Appendix to the Petition for Writ of Certiorari at p. 6a. The memorandum and order of the United States District Court for the District of Montana (Hatfield, D.J.) was not reported. It is reprinted in the Appendix at p.2a.

JURISDICTION

Petitioners brought this action in the District of Montana, invoking federal court jurisdiction under 16 U.S.C. §1540; 28 U.S.C. §1346(a)(2); 28 U.S.C. §1331; and 5 U.S.C. §702. On May 4, 1987, the United States District Court, Montana District granted Respondents' Motion for Summary Judgment and entered judgment thereon. [p.la]

Petitioners appealed to the Ninth Circuit and on September 21, 1988, the Ninth Circuit affirmed the Order of the District of Montana and entered Judgment. Petitioners timely filed a Petition for Rehearing, which Petition was denied by the Ninth Circuit on November 3, 1988. [p.33a]

On January 9, 1989, Petitioners filed an Application for Extension of Time in which to file this Petition up to and including March 3, 1989, on the ground that one of the counsel for Petitioners had been injured. By Order of this Court dated January 12, 1989, this extension was granted.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. §1254(1).

The parties have stipulated to amicus curiae filing of this brief in support of the Petition for the Writ of Certiorari.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

The due process and just compensation clauses of the Fifth Amendment to the United States Constitution, the provisions of which are printed at p. 56a.[1]

The following sections of the Endangered Species Act, the pertinent provisions of which are printed at p. 57a -p. 59a:

16 U.S.C. §1531(a) and (b)

16 U.S.C. §1532(6), (19) and (20)

16 U.S.C. §1533(d)

16 U.S.C. §1538(a)(1)(B)

50 C.F.R. §17.40(b), the pertinent provisions of which are printed at p. 60a.

1. The Fourteenth Amendment to the United States Constitution applies by its own terms only to state and local governments. There is no equal protection clause that governs the actions of the federal government, such as those under consideration in this case. The cases have held however that if the federal government classifies individuals in a way which would violate the equal protection clause of the Fourteenth Amendment, it will be held to contravene the due process clause of the Fifth Amendment. These standards for validity under the due process and equal protection clauses are identical. **Bolling v. Sharpe**, 347 U.S. 497 (1954).

STATEMENT OF CASE

The parties amicus agree with the Statement of Case set forth in the Petition for Writ of Certiorari in this matter.

REASONS FOR GRANTING THE WRIT

I. Introduction

The parties amicus, Montana Stockgrowers Association, Montana Wool Growers Association, Idaho Wool Growers Association, Wyoming Wool Growers Association, Colorado Cattlemens' Association, National Cattlemens' Association and American Sheep Industry representing the interest of some 32,570 members engaged in the livestock industry pray this Court issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in the above-entitled proceeding entered on September 21, 1988. The amicus support the petition filed by Richard P. Christy, Thomas B. Guthrie and Ira Perkins.

Livestock predication by wild animals is one of the risks raising livestock, sheep or cattle, in the mountain west states. In an industry where the profit margins are narrow and where the rancher has little control over either the cost of production or the market value of the product, uncontrolled losses of sheep or cattle quickly jeopardize the economic viability of a ranch unit. Where livestock are threatened by predator losses, it is not merely the lives of the animals themselves which are at stake, but it is the very real ability to continue as an operating unit which is threatened through such losses.

II. Private Property Owners Can Defend Their Property From Destruction

The present case advances facts which demonstrate a taking has occurred. The petitioners all are or were engaged in the sheep industry. Each petitioner had experienced a confrontation between a flock of sheep and a marauding grizzly bear. If any predator other than a grizzly bear were involved, the sheepman could respond to defend the life of his sheep and economic integrity of his ranching unit. That is true whether the predator was a coyote, black bear, lynx, mountain lion or bobcat. Section 87-1-225, MCA; Section 87-3-130, MCA.

In the present instance, however, where a grizzly bear commences grazing on a flock of sheep, the result and outcome changed. The Secretary of Interior has listed the grizzly bear as an endangered and threatened species and prohibited the taking of such animals, except under limited circumstances for individual self defense, by game officials or for limited sport kills. 16 U.S.C. §1533(a)(l); 16 U.S.C. §1532(6), (19), and (20); 50 C.F.R. §17.40(b).

Where a private property owner is forced to experience loss of property, the destruction of sheep or cattle, without a opportunity to defend the property and where the destruction and inability to defend property exists only as to federally protected animals, but not otherwise, a federal taking has occurred and compensation is required. Basically, the destruction of private property which has commercial value by a species protected by the Federal Government constitutes a federal taking entitling the owner to compensation for the loss.

The only way to avoid the conclusion that a taking has occurred and compensation required is to find, as Petitioners above urge, that a Constitutional right exists to protect property from imminent destruction by destroying wild animals then engaged in lifestock predication. The Fifth Amendment to the United States Constitution will provide:

> nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The right to obtain and possess property, recognized by the United States Constitution, is without meaning, unless the property owner has the right to prevent imminent destruction of the property. Without the recognition of such concomitant right, possession of property is subject to defeasance by the whim and caprice of others. A right to own property without recognition of the right to protect property, diminishes and destroys this right of ownership. Such right to own property becomes no longer an absolute right. Property ownership then becomes a privilege subject to the actions of others and relying upon the inaction of others for its preservation. A right which cannot be defended is no right at all.

The present case demonstrates a clear instance where either a constitutional right, the pursuit and possession of property is given meaning by allowing a person to take appropriate steps to prevent destruction of the property, or where this provision, though mentioned in the Constitution, becomes meaningless.

III. Compensation is Required For a Federal Taking

Finally, even if this Court refuses to find a Constitutional right exists to kill protected species which are then engaged in the probable destruction of property, the Court should at the very least, find the event was a Governmental taking which requires compensation.

A taking of property occurs, within the Constitution, under circumstances such as livestock predication presented in this case, and because such taking has occurred, compensation is required. The taking in the Constitutional sense occurs not only when property, real or personal, is seized by eminent domain, but also when land is destroyed or permanently damaged by the acts of a governmental body. **U.S. v. Kansas Life Ins. Co.**, 339 U.S. 799, 70 S.Ct. 885, 94 L.Ed. 1277; **U.S. v. Lynah**, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539.

There is no question that a taking has occurred through the destruction of sheep by a governmentally protected species. While there may be public benefit to having grizzly bears roam free in the wild, it is only the petitioners and the class of businessmen within the organizations who appear as amicus curiae who bear the brunt of this animal's destructive nature and are unable to protect their property from destruction. Admittedly individuals may confront a grizzly bear in the wild, however those individuals can respond and through self-protection destroy the grizzly bear (50 C.F.R. § 17.40(b)). Virtually any other business in an area habitated by grizzly bears will either be undisturbed by the bear or will be able to respond and defend against such predicator attacks if those attacks are directed at employees.

The sheep and cattle industry is unique. Occupying terrain where grizzly bears range, either naturally or as transplants from other areas, the sheepmen and cattlemen rightfully bring to the area domestic animals which attract grizzly bears. Throughout the western states the sheep and cattle industry front against and range within areas occupied by grizzly bear.

To the livestock owners, these deprivations of a herd or flock is a direct loss of income producing property and is a loss which is unpredictable and unpreventable. Since a policy decision has been made which allows these bears to roam free and unregulated, this group alone bears a burden, the prospect of animal loss, which should be borne by all of the public as a whole and not a small class of individuals of whom petitioners and amicus are a part thereof. If, for public policy reasons, and to preserve the grizzly bear this court will not recognize the limited right to kill grizzly bears which are attacking private property, this court nonetheless should recognize that the destruction of private property by an endangered or threatened species is a taking which requires just compensation to be paid by the Federal Government.

CONCLUSION

For the foregoing reasons, and for the reasons otherwise set forth in the Petition for a Writ of Certiorari, the Amicus Curiae herein respectfully urge this Court to grant the Petition for a writ of certiorari in this matter.

Respectfully submitted this 31 day of March, 1989.

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CERTIFICATE OF SERVICE

I, Ronald F. Waterman, one of the attorneys for Amicus Curiae in the in the above-entitled action, do hereby certify that a copy of the foregoing Brief was mailed, postage fully prepaid thereon at Helena, Montana, on the 31 day of March, 1989, and directed to:

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No. 88-1461

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v.

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Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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10pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 88-1461

In The

Supreme Court of the United States

October Term, 1988

RICHARD P. CHRISTY, ET AL.,

Petitioners,

v.

MANUEL LUJAN, JR., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF AMICUS CURIAE OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Mountain States Legal Foundation (MSLF or the Foundation) respectfully submits this brief amicus curiae in support of Richard P. Christy, et al., the Petitioners for certiorari. Copies of letters of consent to this filing have been filed with the Court.

INTERESTS OF AMICUS CURIAE

MSLF is a nonprofit, membership, public interest law foundation dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, private property rights, and the free enterprise system. The Foundation is particularly active in Western public land and natural resource issues.

Foundation members include businesses and individuals in the Western states who live and work in the areas affected by recovery programs for large predators under the Endangered Species Act, 16 U.S.C. §§ 1531-43 (1982). MSLF members directly affected by the ruling below include livestock operators. Additionally, numerous other members who make their livings in the mining, timber, farming, and oil and gas businesses, and those who service these businesses are indirectly affected.

Elimination of long established property rights in order to facilitate predator recovery is an important issue to many rural Westerners. In 1987, the United States Forest Service and Fish and Wildlife Service denied MSLF members in the town of Yellow Pine, Idaho, the only winter road access to their town and homes because of possible disturbance to endangered wolves. The elevation of endangered species over established property rights is a real threat to both homes and livelihoods of rural Westerners.

In this case, the Foundation asks the Court to exercise its jurisdiction in order to define the rights of those whose homes and livelihoods are affected by the ruling below.

STATEMENT OF THE CASE

Amicus curiae adopts Petitioners' statement of the case.

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL GOVERNMENT IS RESPONSIBLE FOR REINTRODUCTIONS OF LARGE PREDATORS AND THE COURT SHOULD DECIDE THE LEGAL RIGHTS AND RESPONSIBILITIES ACCORDINGLY

Since passage of the Endangered Species Act in 1973, the federal government has put a major effort into encouraging the recovery of grizzly bears and wolves. *See* U.S. Fish and Wildlife Service, Grizzly Bear Recovery Plan (January 29, 1982); U.S. Fish and Wildlife Service, Northern Rocky Mountain Wolf Recovery Plan (August 2, 1987). Initial attempts at reintroduction have begun and they affect this case. *See* Petition at 8-9. As those efforts have started to succeed, the federally nurtured predators have increasingly come into conflict with livestock on public and private lands.

As the level of contention has built, Westerners have begun to speak out. In Idaho, the State legislature passed a memorial aimed at blunting adverse impact on the lives of rural Idahoans. Western farming and ranching organizations have spoken out forcefully to try to stop the introduction of predators. *See, e.g.*, American Farm Bureau Federation Petition for Regulatory Changes (January 5, 1989).

The conflict is between federal government policy and property rights in the Western states where the large predators are being reintroduced. This is the kind of dispute between the weak and strong that the judicial branch of our constitutional government was designed to protect. Instead of addressing the conflict between protected predators and Western property owners, the courts have ignored the federal efforts and denied the responsibility of the federal government. The result is a ruling like that in *Christy*. It is time for the Court to abandon the legal fiction and address the property rights conflict.

The lower courts have misassimilated laws denying government responsibility for predators and modern laws prohibiting killing of protected animals. They have, in essence, overruled long established law allowing defense of property against predators. Protected predators will be given free reign if the *Christy* ruling is not reviewed and reversed.

Even the endangered species recovery plans prepared by the United States Fish and Wildlife Service recognize that conflict caused by reintroduction programs is to be avoided. Public acceptance is essential. *See* Northern Rocky Mountain Wolf Recovery Plan at 23. If conflict between the endangered species and rural residents is allowed to fester, then recovery can be jeopardized.

II. THE PUBLIC, NOT SELECT INDIVIDUALS, SHOULD PAY FOR ESTHETIC PUBLIC ENVIRONMENTAL BENEFITS

This case also involves a larger issue of who should pay for esthetic benefits to our nation's environment. The

cost of the cities' health and esthetic environmental benefits, such as clean air, clean water, and toxic clean-up is borne by the nation as a whole either through increased consumer goods costs or taxation. On the other hand, the cost of greenbelts, pristine countryside and streams, and reintroductions of wildlife are typically paid for by rural property owners.

At least theoretically, the laws and Constitution should protect the minority from majority imposition of such a burden. But this has not proven to be true where private property interests conflict with esthetic environmental regulation. Environmental regulation has gone from uncompensated takings to protect the health, safety or morals of a community, *see Mugler v. Kansas*, 123 U.S. 623, 668-69 (1927), to providing convenient public beach access. *See Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) (reversing taking).

The *Christy* case represents the culmination of this trend. Mr. Christy is being punished as a consequence of protecting his personal property within the confines of his real property. Like the landowner in *Nollan*, Mr. Christy is being asked to pay for esthetic benefits to the public by giving up one of the sticks in his bundle of property rights.

The Court should take jurisdiction in this case to rectify this fundamental injustice and misdirection of the law by the lower courts.

III. THE NINTH CIRCUIT'S DECISION COMPLETES ELIMINATION OF A LONG ESTABLISHED PROPERTY RIGHT

Fifty years ago, the right to defend one's property from protected wildlife was a settled principle of law. In 1943, Corpus Juris Secundum stated that "[l]egal justification may always be interposed as a defense by a person charged with killing a wild animal contrary to law. Hence the killing of game protected by the statute or regulations is not prevented by them when reasonably necessary for the protection of person or property . . . " 38 C.J.S. *Game* § 10 at 12 (1943). *See Christy v. Hodel*, 857 F.2d 1324, 1329 (9th Cir. 1988) (App. 16a) (citing cases and annotation). Now the Ninth Circuit says that there is no such right, nor does this situation involve any right of compensation for the taking of private property. *Christy*, 857 F.2d at 1329-30 (App. 18a).

The extreme position of recent circuit court opinions is expressed in the *Christy* opinion, 857 F.2d at 1329 (App. 17a). The court has approved the concept that Congress can pass a law denying a right to protect one's own life from protected predators. *See Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423, 1428 n.8 (10th Cir. 1986) (cited with approval in *Christy*). An ancient right to protect property and person has apparently disappeared without leaving a trace.

CONCLUSION

In recent years the Court has searched for new rights in our Constitution. As it has done so, the judicial system has left behind some of the rights held dear by those who authored the Constitution. If the Constitution does not have a lasting place for life and property; then we must ask, for what does it have a lasting place?

For the above reasons the writ should be granted.

Respectfully submitted,

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Dated: March 31, 1989

No. 88-1461

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

RICHARD P. CHRISTY, THOMAS B. GUTHRIE, IRA PERKINS,
Petitioners,

v.

MANUEL LUJAN, Secretary of the Interior,
UNITED STATES DEPARTMENT OF THE INTERIOR,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

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16 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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BRIEF *AMICUS CURIAE* OF AMERICAN FARM BUREAU FEDERATION IN SUPPORT OF PETITIONERS

The American Farm Bureau Federation respectfully files this brief *amicus curiae*. Pursuant to Supreme Court Rule 36, this brief is filed with the written consent of all parties.

INTEREST OF AMICUS CURIAE

The American Farm Bureau Federation (AFBF) is a non-profit general farm organization incorporated pursuant to the laws of the State of Illinois. Its purposes are to promote, protect and represent the economic, social and educational interests of farmers and ranchers across the United States. The largest general farm organiza-

tion in the country, AFBF has member state organizations in 49 states (including Montana, Idaho and Wyoming) and Puerto Rico, representing the interests of more than 3.6 million member families.

The protection of private property, including crops and livestock, is of paramount importance to farmers and ranchers if they are to be able to pursue their livelihoods. It is especially important to livestock producers who already suffer staggering losses from predation thus forcing many of them out of business. AFBF has been party to previous litigation seeking protection from predation by coyotes and wolves. We have heard from many of our members regarding similar problems with grizzlies, wolves and other listed species urging our participation in this case.

Farming and ranching are the production of crops and livestock. While land and machinery are essential to production, there can be no agriculture without crops or livestock. Protection of crops and livestock is critical to continued agricultural production. The instant case prevents farmers and ranchers from protecting their crops and livestock from grizzly bear predation, thereby preventing them from pursuing their livelihood.

The instant case not only has ramifications for farmers and ranchers, but for private property owners everywhere. Protection of private property rights strikes to the heart of our societal fabric and must be explicitly recognized by our Constitution. The lower court decision goes beyond a denial of the right to protect property, however. While denying the rights of producers to protect their crops and livestock from grizzly bear destruction, the decision also permits those same bears to be hunted by sportsmen. The clear implication is a subordination of private property rights to the recreational interests of sportsmen. This, we submit, is not what the framers of our Constitution intended.

STATEMENT OF THE CASE

Petitioners are all former sheep producers who suffered substantial losses from grizzly bears, listed as "threatened" under the Endangered Species Act [16 U.S.C. § 1531 *et seq.*]. The grizzly is "an animal that cannot compromise or adjust its way of life to ours" (inside cover, *Grizzly Bear Recovery Plan*, U.S. Fish & Wildlife Service, 1982) and which had caused depredation to livestock since the early days of settlement of the West (p. 4-5 *Grizzly Bear Recovery Plan*).

Petitioner Christy began experiencing losses of sheep to grizzly bears on or about July 1, 1982. Pursuant to U.S. Fish & Wildlife Service (FWS) regulations [50 CFR 17.40(b)] Mr. Christy contacted the FWS to remove the bears from his property. Their efforts to trap the bears proved utterly fruitless.

By July 9, 1982, Christy had lost 27 sheep to grizzly predation. On that date, in the company of a local FWS agent, Christy noticed grizzlies about to attack his sheep. He killed one of the grizzlies and the other ran off. On July 24, 1982, he removed his sheep and terminated his lease, having lost 84 sheep.

Christy was subsequently charged with "taking" a threatened species in violation of the Endangered Species Act and the procedures set forth in 50 CFR 17.40. That same regulation, while prohibiting a landowner from taking a grizzly that is killing livestock, permits a limited sport hunting season of up to 25 grizzlies per year in the same area where Christy's sheep were located.

Christy's case was heard before an Administrative Law Judge (ALJ). After finding that he "is without jurisdiction to consider whether or not a statute enacted by Congress is constitutional" and that "neither may the question of validity of the implementing Departmental regulations be considered," (Appendix to Petition for

Writ, p. 48a), the ALJ fined Christy $2,500 for removing the bear.

Christy brought an action in the federal court for the district of Montana challenging the application of the Endangered Species Act and implementing regulations on the grounds that he was denied his constitutional rights to protect his property, that his property was "taken" without compensation in violation of the Fifth Amendment to the U.S. Constitution, and claimed that by denying him the right to protect his property but allowing sportsmen to hunt grizzlies, he was denied equal protection under the law.

The district court prohibited any discovery and granted the government's motion for summary judgment on all claims.

The Ninth Circuit, despite finding that "we do not minimize the seriousness of the problem faced by livestock owners such as plaintiffs nor do we suggest that defense of property is an unimportant value," affirmed the district court in an opinion published at 857 F.2d 1324 (9th Cir. 1988). Its primary rationale was that neither the Constitution nor the Supreme Court had explicitly recognized a fundamental right to defend property.

The Ninth Circuit also held that there was no unconstitutional "taking" of Christy's property, citing *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265, 97 S.Ct. 1740, 52 L.Ed.2d 304 (1977) and *Sickman v. United States*, 184 F.2d 616 (7th Cir. 1950), *cert. denied*, 341 U.S. 939, 71 S.Ct. 999, 95 L.Ed. 1366 (1951). Those cases hold that neither the state nor the federal government has title to wild animals until they are "reduced to possession by skillful capture." Key to the Ninth Circuit's holding was a finding that "plaintiffs do not contend, and the record does not show, that the federal government physically introduced any bears to the areas near plaintiffs' properties," and therefore was "a question we do not decide." (See ftn. 9, 857 F.2d at 1335).

In fact, there is a genuine issue whether or not the bears that ravaged Christy's flock had been relocated in the area after causing livestock losses elsewhere. (See Affidavits of Richard Christy and Sue Ann Love, *Appendix to Petition for Writ*, pages 35a-40a). Possible capture and relocation of problem bears to Christy's area is certainly relevant to the "taking" issue because these bears would have been reduced "to possession through skillful capture" by the FWS within the *Sickman* and *Douglas* criteria, and the result might very well have been different here. These facts could very well have been determined had the district court permitted discovery.

Petitioners' Request for Rehearing, based on the Affidavits, was denied by the Ninth Circuit.

REASONS FOR GRANTING THE WRIT

This case raises several fundamental yet unresolved issues regarding the sanctity of private property rights and the extent that those rights are constitutionally protected.

The immediate context of this case permits this Court to define the scope of these rights, as well as to decide specific issues that are of extreme importance to rural areas around the nation.

Wildlife protection statutes such as the Endangered Species Act have been interpreted by the federal agencies as giving them virtual *carte blanche* authority to force private landowners to shelter and feed "protected" wildlife at their own expense. Statutes such as the Endangered Species Act are purportedly for the public benefit, yet the general public has assumed few of the costs of such protection and no responsibility for any damages that protected species might inflict. Instead, those expenses are solely borne by private landowners

like Christy who must sit idly by while protected species feed on crops and livestock. In destroying crops and livestock, these protected species also destroy the very means by which producers can pursue their livelihood.

The problems experienced by agricultural producers are growing in severity and numbers. The very same problems raised here were experienced by ranchers in Minnesota (losses to wolves) [*Brzoznowski v. Andrus*, D.C., Minn., No. CA-5-77-19 (1980)], and in Nevada (losses to wild horses) [*Mountain States Legal Foundation v. Hodel*, 799 F.2d 1423 (10th Cir. 1986)]. These problems have already sparked conflicts between producers seeking to protect their livelihood and their government which is elected and appointed to represent and serve them.

I. The Extent and Scope of Private Property Rights Needs Definition

The nation was founded on the basic premise of the right to acquire and possess property without undue interference by the federal government. The court below found no decision by this Court that defines the nature and extent of that right and the ability of private individuals to protect that right.

Several state courts have resolved the issue whether private individuals have a right to protect their property, even if such a right is not expressly mentioned in the state constitution. (See *Cross v. State of Wyoming*, 370 P.2d 371 (Wyo. 1962), and the decisions from numerous jurisdictions cited therein). With the federal government assuming a greater role in protecting wildlife through such statutes as the Endangered Species Act, Wild and Free-Roaming Horses and Burros Act, and the Bald and Golden Eagle Protection Act, to name only a few, the time has come to squarely address the issue within the context of the U.S. Constitution.

The Court has generally described the criteria as to what constitutes a "fundamental right" under the constitution. Rights are "fundamental" if they are "implicit in the concept of ordered liberty" *Palko v. Connecticut*, 302 U.S. 319, 325, 58 S.Ct. 149, 152, 82 L.Ed. 288 (1937) or if they are "deeply rooted in this Nation's history and tradition," *Moore v. City of East Cleveland*, 431 U.S. 494, 503, 97 S.Ct. 1932, 1938, 52 L.Ed.2d 531 (1977). We submit that protection of private property and the ability to pursue an agricultural livelihood meet both standards.

Absent clear direction from this Court, lower federal courts are extremely reluctant to interpret these standards and determine fundamental rights on their own. In *Mountain States, supra*, the Tenth Circuit stated that "No case has yet addressed whether a [right to defend property] exists under the United States Constitution." [1] and declined the express invitation to be the first court to do so.

The Ninth Circuit below was even more reluctant to address the issue without direction from this court. Citing *Bowers v. Hardwick*, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986) and its caution not to "expand" the reach of the constitution by "re-defining the category of rights deemed fundamental," [2] the Ninth Circuit stated:

> In light of the Supreme Court's admonition that we exercise restraint in creating new definitions of substantive due process, we decline plaintiffs' invitation to construe the fifth amendment as guaranteeing the right to kill federally protected wildlife in defense of property. In so doing, we do not minimize the seriousness of the problem faced by live-

[1] 799 F.2d at 1428, ftn. 8.

[2] 478 U.S. at 194. We submit that a fundamental right to protect property can be found without such "re-definition."

stock owners such as plaintiffs nor do we suggest that defense of property is an unimportant value. We simply hold that the right to kill federally protected wildlife in defense of property is not "implicit in the concept of ordered liberty" nor so "deeply rooted in this Nation's history and tradition" that it can be recognized *by us* as a fundamental right guaranteed by the Fifth Amendment." (Emphasis added.)[3]

It seems clear that both the Ninth and Tenth Circuits are looking for direction from this Court on the issue of whether protection of private property is a constitutionally protected right, since both courts declined to address the issue on their own.

II. The Regulatory Scheme at Issue Unduly and Arbitrarily Restricts the Defense of Private Property in Violation of the Equal Protection Clause

Even if the Court were to determine that defense of property is not a "fundamental right" under the constitution, this case still presents a significant issue for resolution concerning the importance of private property rights.

The grizzly bear regulations subordinate the right of a landowner to protect his property to the recreational interests of sport hunters. Under 50 CFR 17.40(b)(1)(i)(C) private landowners must suffer "significant depredations" before a grizzly may be taken from an area, and only then the "taking" must be by a state, tribal or federal authority and only after efforts to trap and remove the bear have proven unsuccessful.[4]

By contrast, 50 CFR 17.40(b)(1)(i)(E) permits sport hunting of up to 25 grizzlies in the area where Christy's

[3] 857 F.2d at 1330.

[4] Efforts to trap and remove bears on Christy's lands were completely unsuccessful, resulting in the loss of 84 sheep.

losses occurred. The only private individuals allowed to kill grizzlies under the regulations are sport hunters.

The regulations prohibiting a private landowner from protecting his own property against grizzlies cannot therefore be sustained on the basis of protecting a threatened species if sport hunting of that species is permitted. Regardless of the degree of importance placed on the protection of private property, there is something disturbingly out of balance in our society if people who are seeking to protect their livelihoods are punished for actions which others are permitted to take for sport.

Neither the Ninth Circuit below nor the Tenth Circuit in *Mountain States* was willing to address this issue until this Court takes action. In the meantime, farmers and ranchers are suffering crop and livestock losses and appear doomed to continue to do so.

III. This Case Presents Significant Issues Pertaining to Fifth Amendment "Takings"

Wildlife protection statutes such as the Endangered Species Act are based on the premise that there is a "public benefit" to preservation of protected species. As such, costs for preservation must be borne by the general public. In the present case, as in other cases under these statutes, farmers and ranchers bear a disproportionate share of those costs.

The Ninth Circuit conclusion that "neither the ESA nor the grizzly bear regulations 'force' plaintiffs to bear any burden"[5] is belied by the regulation itself, which provides for removal only after "significant depredations." [50 CFR 17.40 (b)(1)(i)(C)]. The conclusion that such losses are "incidental, and by no means inevitable,"[6] is similarly belied by the statement in the FWS Grizzly Bear Recovery Plan set forth in our State-

[5] 857 F.2d at 1335.

[6] *Ibid.*

ment of Interest, above, that grizzly bear conflicts with livestock have occurred throughout the settlement of the West. There is little question that grizzly-livestock conflicts are "inevitable" in areas where both are found.

The Court has recently reiterated that "the Fifth Amendment just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. ——, 107 S.Ct. 2378, 2388, 96 L.Ed.2d 250 (1987).

In fact the Court, in *First English* and in *Nollan v. California Coastal Commission*, 483 U.S. ——, 107 S.Ct. 3141 (1987), clarified the nature and scope of the Fifth Amendment "taking clause". The present case should be scrutinized in light of these recent decisions.

In both *First English* and *Nollan*, the Court reiterated that takings are more readily found where there are physical invasions "without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-435 (1982). There is no question that the grizzlies "physically invaded" Christy's property, and in fact drove him out of business.

Nollan further states that the "evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[7] Here, the prohibition against protection of one's property cannot be used to justify any "end" of protecting wildlife as long as sport hunting is permitted.

Courts have permitted the federal government to evade their Fifth Amendment just compensation responsibili-

[7] 107 S.Ct. at 3148.

ties on the grounds that governmental authorities do not "own" wild animals and are therefore, not responsible for their actions. (See *Sickman* and *Douglas*, *supra.*) Governmental agencies, however, impose management criteria and restrictions in implementing wildlife protection statutes that narrow the range in which such animals exist, thereby defining the habitat for these species to a great degree. One example of this management style is the "critical habitat" direction in the Endangered Species Act, 16 U.S.C. § 1533.

As management restrictions and the resultant habitat enhancement become more specific, the more "protected" animals are likely to be found in areas where government wants them. At some point they have crossed the line of being "reduced to skillful capture" for which the government must assume responsibility for the damage these animals cause to farmers and ranchers. That line should be drawn by this Court in order to prevent even more uncompensated injury to agriculture. This case presents a golden opportunity for this Court to resolve this important issue.

This case also presents an opportunity to address one other issue of importance—the responsibility of the government to provide compensation to private landowners for damages caused by "protected animals" which the government has itself *introduced* into an area. This issue is not only significant for areas where the government has relocated "problem bears" or "problem wolves," but is also important in cases where our government is proposing the re-introduction of species in areas where they no longer exist or never existed. Petitioners have mentioned in their Petition the plans to re-introduce wolves into the Yellowstone Park area. There are also plans to re-introduce endangered California condors and black-footed ferrets into areas where they no longer exist. Also, peregrine falcons are being introduced into new areas.

It seems clear that such re-introduced animals have been "reduced to skillful capture" by any test that *Sickman, Douglas* or any other court might apply. There can be no doubt that the government would be responsible for compensation of damages caused to agriculture by such animals within the *Sickman* and *Douglas* criteria.

There is evidence in this case that the grizzlies that attacked Christy's sheep might have been relocated to the area. See Christy and Love affidavits (*Appendix to Petition*, pages 34a-40a) . By prohibiting discovery, the District Court prevented development of these facts which would be vital to Christy's taking claim. The "administrative record" is itself insufficient to resolve the Constitutional claims, because these issues were admittedly not before the ALJ. The Ninth Circuit denied a Petition for Rehearing to develop these facts as well.

We submit both courts were in error in preventing development of these facts and in granting summary judgment to Respondent. Rule 56 of the Federal Rules of Civil Procedure prohibits entry of summary judgment if there is a "genuine issue of material fact." We submit that the affidavits raise such a "genuine issue of material fact" which would quite possibly change the result. Such facts could not be known because the district court prohibited discovery. If Petitioners are to receive justice, these facts should be permitted to be developed.

CONCLUSION

The nature and extent to which individuals can protect their private property is an important and fundamental issue that has not heretofore been addressed by this Court. Two circuits have now specifically declined to tackle the issue absent direction from this Court. Further, the extent of the Fifth Amendment just compensation clause as applied to damage caused by protected wildlife should be determined in accordance with the recent Supreme Court clarification of this issue.

This case should be reviewed to provide the direction and analysis that lower courts need in order to address these important issues.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

RICHARD P. CHRISTY, ET AL., PETITIONERS *v.* MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR AND UNITED STATES DEPARTMENT OF THE INTERIOR

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 88-1461. Decided June 12, 1989

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

Petitioner is a herder who grazed his sheep on leased land near Glacier National Park. Between July 1 and July 9, 1982, grizzly bears from the park killed 20 of petitioner's sheep. Requests for assistance from park rangers yielded no results, and efforts to frighten away the bears were unsuccessful. On July 9, when two grizzlies emerged from the forest and approached petitioner's sheep, he shot and killed a bear. Grizzlies, however, are "endangered species;" petitioner's killing of the bear thus violated the Endangered Species Act, which makes it unlawful to "harass, harm pursue, hunt, shoot, wound, kill, trap, capture, or collect" grizzlies and other animals protected by the statute. 16 U. S. C. § 1538(a)(1). Petitioner was consequently assessed a $2,500 penalty for shooting the bear.

Petitioner then filed this action in District Court, seeking to enjoin enforcement of the Act against herders like himself, and resisting payment of the $2,500 penalty. Petitioner claimed, *inter alia*, that his actions in defense of his livestock were protected by the Due Process Clause of the Fifth Amendment; alternatively, petitioner contended that t. e Act resulted in an uncompensated "taking" of his property. Both the District Court and the Ninth Circuit rejected these claims, and this petition ensued.

I would grant the petition for certiorari to consider petitioner's constitutional claims. Petitioner's claim of a constitutional right to defend his property is not insubstantial. A man's right to defend his property has long been recognized at common law, see W. Blackstone, Commentaries *138–140, and is deeply-rooted in the legal traditions of this country, see, *e. g.*, *Beard* v. *United States*, 158 U. S. 550, 555 (1895). Having the freedom to take actions necessary to protect one's property may well be a liberty "deeply rooted in this Nation's history and tradition," *Moore* v. *East Cleveland*, 431 U. S. 494, 503 (1977) (opinion of Powell, J.), and therefore, entitled to the substantive protection of the Due Process Clause. In any event, petitioner's claim to such protection presents an interesting and important question—the proper resolution of which is not altogether clear—that merits plenary review.

Even more substantial is petitioner's claim that the Endangered Species Act operates as a governmental authorization of a "taking" of his property; leaving him uncompensated for this taking violates the Fifth Amendment, petitioner contends. There can be little doubt that if a federal statute authorized park rangers to come around at night and take petitioner's livestock to feed the bears, such a governmental action would constituted a "taking." The Court of Appeals below, and the United States in its submission here, distinguish such a case from this one, by noting that the United States "does not 'own' the wild animals it protects, nor does the government control the conduct of such animals." 857 F. 2d 1324, 1335 (CA9 1988); see Brief of the Respondents 7.

Perhaps not; but the government does make it unlawful for petitioner to "harass, harm, [or] pursue" such animals when they come to take his property—and perhaps a government edict barring one from resisting the loss of his property is the constitutional equivalent of an edict taking such property in the first place. Thus, if the government decided (in lieu of the food stamp program) to enact a law barring grocery store

owners from "harassing, harming, or pursuing" people who wish to take food off grocery shelves without paying for it, such a law might well be suspect under the Fifth Amendment. For similar reasons, the Endangered Species Act may be suspect as applied in petitioner's case.

In sum, sustaining grizzly bears is a worthwhile and important governmental objective. But it "is axiomatic that the Fifth Amendment's just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *First English Evangelical Lutheran Church* v. *County of Los Angeles*, 482 U. S. 304, 318–319 (1987) (quoting *Armstrong* v. *United States*, 364 U. S. 40, 49 (1960)). Here, petitioner has been asked to bear the burden of feeding endangered grizzlies—or at the least, has been estopped from taking measures necessary to prevent the use of his property for this purpose. Thus, it seems quite possible that petitioner has been denied the Fifth Amendment's protection against uncompensated takings.

Because I think that petitioner's constitutional claims present interesting and important questions that merit our attention, I dissent from the Court's denial of review in this case.